

No. 22-56199

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUGA LABS, INC.,

Plaintiff-Appellee,

v.

RYDER RIPPS, JEREMY CAHEN,

Defendants-Appellants,

and

DOES 1-10,

Defendants.

**On Appeal from the United States District Court
for the Central District of California, No. 2:22-cv-04355 (Walter, J.)**

**SUPPLEMENTAL EXCERPTS OF RECORD
Volume 1 of 1**

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

20

Yuga Labs, Inc.,

Plaintiff,

V.

Ryder Ripples, Jeremy Cahen, Does 1-10,

Defendants.

Case No. 2:22-cv-04355-JFW-JEM

REPLY IN SUPPORT OF ANTI-SLAPP MOTION TO STRIKE AND MOTION TO DISMISS

Hearing Date: Nov. 7, 2022, at 1:30p.m.,
Pursuant to Standing Order ¶ 5(a)
Judge: Hon. John F. Walter

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1 I. **INTRODUCTION**

2 Trademark law cannot be used to silence free speech. The First Amendment
3 limits a trademark holder's right to muffle its critics, and to survive dismissal under
4 the *Rogers* test, Yuga would have had to plead that Mr. Ripps's and Mr. Cahen's use
5 of its alleged marks either is "not artistically relevant" or "explicitly misleads
6 consumers." *Dr. Suess Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 462 (9th Cir.
7 2020). Yuga's Opposition Brief confirms that it did not and cannot do either: its
8 effort to contest the artistic relevance of its marks to the RR/BAYC project is weak,
9 and it fails to identify even a *single consumer* that has ever been misled.

10 Instead, Yuga's Opposition Brief tries to save its futile trademark claims
11 (Claims 1-7) by artificially separating the *sale* of RR/BAYC NFTs from Defendants'
12 free speech activity associated with the RR/BAYC *project*. But artwork—especially
13 performance and conceptual art—cannot be understood divorced from its context. As
14 the allegations of the Complaint make clear, the *sale* of RR/BAYC NFTs *was* part of
15 Defendants' protected speech. In fact, Yuga itself alleges that Mr. Ripps described the
16 RR/BAYC project as "satire" and encouraged collectors to purchase RR/BAYC
17 project NFTs specifically to protest Yuga. Dkt. No. 1 ¶¶ 5, 56, 72, 116. The
18 Complaint, through its incorporation of the <https://rrbayc.com> website (Dkt. No. 1 ¶¶
19 34, 36, 48, 81), also explains that "RR/BAYC uses satire and appropriation to protest
20 and educate people regarding The Bored Ape Yacht Club and the framework of
21 NFTs" and that "[t]he work is an extension of and in the spirit of other artists who
22 have worked within the field of appropriation art." Yuga cannot escape the *Rogers*
23 test by separating RR/BAYC sales from the overall RR/BAYC project—the sales
24 were an integral part of the artistic project.

25 Yuga's Opposition Brief also attempts to dodge nominative fair use by claiming
26 that the Defendants improperly used exact copies of the BAYC digital images. Dkt.
27 No. 23 at 19. But Yuga ignores that Defendants' commentary required reference to
28

1 those exact images to express that NFTs are not themselves digital images, but rather
2 are digital tokens that can point to digital images—a point that Mr. Rипps has
3 emphasized in his work for years. Had the RR/BAYC project used different images, it
4 could not have made the point that Yuga is not selling digital images when it sells
5 BAYC NFTs (and of course, if Yuga’s concern was that Mr. Rипps and Mr. Cahen
6 were using copies of protected images, their remedy would be in copyright law, not a
7 trademark action.) All claims should be dismissed.

8 **II. ARGUMENT**

9 **A. The Entirety of the RR/BAYC Project Is Protected Speech**

10 The allegations in the Complaint contradict Yuga’s argument that that the
11 RR/BAYC project has “no expressive content or transformation” and is unprotected
12 “commercial speech.” Dkt. No. 53 at 7, 10. Yuga can only reach this conclusion by
13 artificially severing the ***sale*** of RR/BAYC NFTs from the public commentary by Mr.
14 Rипps and Mr. Cahen in the RR/BAYC ***project***. But the RR/BAYC project as a
15 whole—which includes the sale of RR/BAYC NFTs—was created as an act of protest
16 and criticism of Yuga, as the Complaint itself alleges. For example, the Complaint
17 alleges that Mr. Rипps explained in a May 25th tweet “how the website rrbayc.com
18 works” stating that you pick an ape “it will get transferred to your wallet, Then you
19 can say fuck off to @BoredApeYC!” Dkt. No. 1 ¶ 53. This allegation shows that the
20 ***sale*** of the RR/BAYC NFTs—the “transfer[] to your wallet”—was not a separate act
21 distinct from the protest against Yuga but was inextricably intertwined with it.

22 The Complaint further alleges that Mr. Rипps has described RR/BAYC as
23 “satire,” stated that he “would like to illuminate what nfts are, and show bayc for what
24 it really is,” and has encouraged collectors to purchase RR/BAYC NFTs to protest
25 Yuga’s racist messages and imagery. Dkt. No. 1 ¶¶ 3, 5, 49, 56, 57, 72, 116. The
26 Complaint also incorporates by reference <https://rrbayc.com> by repeatedly discussing
27 and including hyperlinks to the webpage. *See Khoja v. Orexigen Therapeutics, Inc.*,
28

1 899 F.3d 988, 1007 (9th Cir. 2018) (affirming incorporation by reference of a
 2 document repeatedly referenced in the complaint); Battle v. Taylor James, LLC, No.
 3 21-cv-07915-FWS-KES, 2022 WL 2162930, at *6 (C.D. Cal. June 15, 2022) (holding
 4 that a hyperlink in a complaint incorporated the linked document); United States v.
 5 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (“Even if a document is not attached to a
 6 complaint, it may be incorporated by reference into a complaint”). The webpage
 7 explains:

8 Through the process of “re-minting”, the original BAYC images are
 9 recontextualized – illuminating truths about their origins and meanings as
 10 well as the nature of Web3 – the power of NFTs to change meaning,
 establish provenance and evade censorship.

11 RR/BAYC uses satire and appropriation to protest and educate people
 12 regard The Bored Ape Yacht Club and the framework of NFTs. The work
 13 is an extension of and in the spirit of other artists who have worked within
 14 the field of **appropriation art**.

15 These allegations show that the sale RR/BAYC NFTs and the public commentary of
 16 the RR/BAYC project are inextricably linked. Specifically, The RR/BAYC project is
 17 performance and conceptual art that uses the *sale* of unique NFTs to recontextualize
 18 BAYC images in a manner that sheds light on Yuga’s racist and neo-Nazi messaging.

19 Yuga also attempts to drive a wedge between the RR/BAYC’s founders,
 20 suggesting that somehow only Mr. Rипps and not Mr. Cahen engaged in protected
 21 speech. Dkt. No. 53 at 10. But again, this contradicts the allegations of the
 22 Complaint. Yuga has alleged that “Rипps, Cahen, and Does 1-5 ... promote *their*
 23 RR/BAYC NFT collection” and that “in May 2022, Rипps, Cahen, **and** Does 1-5
 24 created a website that allows users ‘reserve’ RR/BAYC NFTS”—this is the same
 25 website (<https://rrbayc.com>) that explains the context behind the satirical RR/BAYC
 26 project. Dkt. No. 1 at ¶¶ 33, 34. According to the allegations of the Complaint, Mr.
 27 Cahen undoubtedly participated in the free speech activity alongside Mr. Rипps.

1 Last, Yuga argues that its silencing of First Amendment protected speech is
 2 somehow superfluous to this litigation, because Yuga is solely interested in enforcing
 3 trademark rights. Dkt. No. 53 at 11. But, as discussed in detail below, the
 4 enforcement of trademark rights stops at the door of the First Amendment—that is the
 5 point of the *Rogers* test and the nominative fair use doctrine. Moreover, Yuga’s
 6 argument that this lawsuit is about commercial protection flies in the face of its actual
 7 conduct: there are countless entities that profit from counterfeit BAYC or Yuga NFTs.
 8 *See* Dkt. No. 48-2. But Yuga has not sued any actual knock-offs. Instead, it sued
 9 only Mr. Ripps and Mr. Cahen, who have been publicly criticizing Yuga’s use of
 10 racist and neo-Nazi messages and imagery.

11 **B. Yuga’s Claims Fail the *Rogers* Test**

12 Yuga’s trademark infringement claims (Claims 1-7) are fundamentally flawed
 13 because they do not and cannot allege that the underlying conduct was not artistically
 14 relevant. Dkt. No. 53 at 13. To the contrary, as explained above, the Complaint
 15 confirms that the RR/BAYC project is conceptual art aimed at criticizing Yuga’s use
 16 of racist messages and imagery. These allegations go well beyond the *Rogers* test’s
 17 “above zero” requirement for artistic relevance. *Gordon v. Drape Creative, Inc.*, 909
 18 F.3d 257, 268 (9th Cir. 2018).

19 Despite the Complaint’s repeated allegations of artistic expression, Yuga argues
 20 that the RR/BAYC project “is no more artistic than the sale of a counterfeit handbag,
 21 making the *Rogers* test inapplicable.” Dkt. No. 53 at 9. But the handbag cases that
 22 Yuga cites, such as *Chanel, Inc. v. Hsio Yin Fu*, No. 16-cv-02259, 2017 WL 1079544,
 23 at *4 (N.D. Cal. Mar. 22, 2017) and *Givenchy S.A. v. BCBG Max Azria Group, Inc.*,
 24 No. 10-cv-08394, 2012 WL 3072327, at *6 n.8 (C.D. Cal. Apr. 25, 2012), are
 25 inapposite. These handbag cases involve garden-variety counterfeiting operations
 26 where there was no credible claim of artistic expression. This is not such a case.
 27 Here, the Defendants include a well-known artist, and their work has triggered
 28

1 widespread public commentary about Yuga's use of racist and neo-Nazi messages and
2 imagery and the nature of an emerging technology (NFTs).

3 The Complaint also fails to plead that the RR/BAYC project is explicitly
4 misleading. Rather, Yuga concedes that use of a mark is *not* explicitly misleading
5 when "the junior user employed the mark in *different contexts* and markets than the
6 senior users." Dkt. No. 53 at 14 (emphasis added). Context matters. As explained
7 earlier, the Complaint alleges that Mr. Ripps and Mr. Cahen created RR/BAYC to
8 "show bayc for what it really is" and to allow collectors to say "fuck off to
9 @BoredApeYC!" Dkt. No. 1 ¶¶ 53, 57. The Complaint also admits that Mr. Ripps
10 and Mr. Cahen primarily marketed and sold RR/BAYC NFTs on their Twitter pages,
11 <https://rrbayc.com>, and [Foundation.app](#)—none of which are marketplaces that sell any
12 Yuga products and (but for [Foundation.app](#)) are replete with content critical of Yuga.
13 See, e.g., *id.* ¶¶ 34, 48, 53, 57. These allegations contradict a claim of explicitly
14 misleading conduct.

15 Yuga's reliance on the *Hermès* decision (Opp at 15) is likewise unavailing
16 because it likewise ignores the context of the RR/BAYC project. In *Hermès*, the
17 defendant made statements *praising* the Hermès brand, typical of those made when
18 parties are working collaboratively. [*Hermes Int'l v. Rothschild, No. 22-CV-384*](#)
19 [*\(JSR\), 2022 WL 1564597, at *6 \(S.D.N.Y. May 18, 2022\)*](#). As a result, the *Hermès*
20 complaint alleged multiple accounts of explicitly misleading use of the mark,
21 including consumers posting that they believed there was an affiliation between
22 Hermès and the NFT collection, and several news articles, including in *Elle* and the
23 *New York Post*, that reported (incorrectly) the NFTs were made in partnership with
24 Hermès. *Id.* at *2. Here, by contrast, the Complaint alleges that the RR/BAYC
25 project has been heavily critical of Yuga (Dkt. No. 1 ¶¶ 3, 5, 49, 56, 57, 72), which
26 precludes a reasonable consumer from believing that Yuga partnered with Mr. Ripps
27 and Mr. Cahen for the RR/BAYC collection. Put more simply: who could ever
28

1 believe that Yuga was sponsoring the artists making “accusations of racism” and
2 encouraging people to “say fuck off to @BoredApeYC!”? Dkt. No. 1 ¶¶ 3, 49, 53.
3 And of course, the Complaint also fails to allege even a single instance of actual
4 confusion; in fact, it fails to mention actual confusion entirely.

5 Finally, Yuga concedes that that collectors of RR/BAYC NFTs would sign a
6 disclaimer that explained that RR/BAYC NFTs have no association with Yuga. Dkt.
7 No. 53 at 16. This is an admission by Yuga that Defendants acted in good faith and
8 explained to the public the context of RR/BAYC NFTs, how they criticize Yuga, and
9 that they point to the same digital images as BAYC NFTs to educate the public about
10 the framework of NFTs (that NFTs are not digital images). Yuga tries to fix this hole
11 in its Complaint by stating for the first time in their Opposition Brief that the
12 RR/BAYC NFTs “explicitly misled other consumers through both initial interest and
13 post-sale confusion.” Dkt. No. 53 at 7. But the Complaint makes no such allegation.

14 C. Defendants’ Conduct Is Protected as Nominative Fair Use

15 Yuga argues that it is improper to address nominative fair use at the pleadings
16 stage. Yuga is wrong. It is well-established that trademark claims can be dismissed
17 pursuant to Rule 12(b)(6) under nominative fair use. *Applied Underwriters, Inc. v.*
18 *Lichtenegger*, 913 F.3d 884, 897 (9th Cir. 2019) (affirming dismissal of complaint due
19 to nominative fair use). The Ninth Circuit held in *Applied Underwriters* that dismissal
20 under nominative fair use was appropriate when (1) defendants were critical of
21 plaintiff’s products, (2) defendants used a disclaimer, and (3) defendants used
22 plaintiff’s mark in a manner that identified the defendants. *Id.*

23 The allegations in this case plainly meet all three elements of the *Applied*
24 *Underwriters* test. With respect to the first factor (criticism), the Complaint itself
25 confirms that RR/BAYC is critical of Yuga by alleging that it is “satire,” meant to
26 “show bayc for what it really is,” that Mr. Ripps has made “accusations of racism,”
27 and that the project allows collectors to say, “fuck off to @BoredApeYC!” Dkt. No. 1
28

¶¶ 5, 49, 53, 57. As to the second factor (disclaimer), the incorporated website <https://rrbayc.com> explains that RR/BAYC is not a Yuga affiliated project, and Yuga admits that collectors were required to acknowledge a disclaimer before purchasing RR/BAYC NFTs on <https://rrbayc.com>. And for the third factor (identification), the Complaint alleges that that the RR/BAYC project was carried out in a manner that identified Defendants, such as on their personal Twitter and Instagram accounts, and the website <https://rrbayc.com>. Dkt. No. 1 ¶¶ 5, 49, 57. Even the token tracker that the Complaint incorporates by discussing and hyperlinking (<https://etherscan.io/addresses/0x2ee6af0dff3a1ce3f7e3414c52c48fd50d73691e>) identifies “*ryder-ripps.eth” as the creator. Compl. ¶ 39; Dkt. No. 48 at 16. And of course, the “RR” in the name of the project are Mr. Rippes’ own initials.

Nor is Defendants’ use of Yuga’s exact marks¹ an issue. As alleged in the Complaint, the RR/BAYC project uses satire to criticize Yuga. That criticism cannot exist without referencing the BAYC collection by name, and the Ninth Circuit has recognized that nominative fair use protects this kind of referential use of trademarks so that defendants can identify specific brands or products without using descriptive phrases. *Applied Underwriters*, 913 F.3d at 894.

Further, the RR/BAYC project necessarily requires using pointers to digital images that include the entirety of Yuga’s Nazi-derived logo. As explained on <https://rrbayc.com>, one of the purposes of RR/BAYC was to “educate[] people regarding . . . the framework of NFTs.” The RR/BAYC project shows that NFTs offer no exclusivity with associated digital resources by using verifiably unique NFTs to point to the same (publicly available) digital images as the BAYC NFTs. Had Defendants altered the digital images (and the marks contained therein) in any way, the RR/BAYC project would no longer expose that Yuga is not selling digital images

¹ Notably, since filing its Complaint, Yuga has abandoned its application for federal registration of the asserted mark APE. (Dkt. No. 1 ¶ 27).

1 when it sells BAYC NFTs. In a similar vein, pointers to the BAYC digital images,
2 and the Yuga marks contained therein, were necessarily used to identify the BAYC
3 collection as the subject of this critique and to recontextualize “the original BAYC
4 images … illuminating truths about their origins and meanings.” Dkt. No. 48-4
5 (excerpt from <https://rrbayc.com> webpage).

6 **D. Yuga’s Cybersquatting Claim Also Fails The *Rogers* Test**

7 Contrary to Yuga’s position, the Court can and should apply the *Rogers* test to
8 the cybersquatting claim at issue here. The Ninth Circuit has held that the *Rogers* test
9 “requires courts to construe the Lanham Act to apply to artistic works only where the
10 public interest in avoiding consumer confusion outweighs the public interest in free
11 expression.” *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099
12 (9th Cir. 2008) (internal quotation omitted). Thus, the root of the test is a balancing of
13 First Amendment protections against “the public’s right to be free from consumer
14 confusion....” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1242 (9th Cir. 2013). The
15 *Rogers* test, therefore, applies to any trademark-related claims that involve consumer
16 confusion, and cybersquatting is undisputedly one of those claims. See *Calista*
17 *Enters. Ltd. v. Tenza Trading Ltd.*, 43 F. Supp. 3d 1099, 1031 (9th Cir. 2014)
18 (holding that cybersquatting claims require likelihood of confusion).

19 **E. Yuga’s False Advertising Claim Is Insufficiently Pleading**

20 Yuga fails to allege any misleading representations of fact to support its false
21 advertising claim. Instead, Yuga’s Opposition Brief offers the conclusory assertion
22 that Defendants “advertised their copycat ‘Ryder Ripps Bored Ape Yacht Club’ as
23 equivalent to the Bored Ape Yacht Club” without providing any statements or
24 supporting allegations. Dkt. No. 53 at 21. And without presenting any statements
25 where Defendants equated Defendants’ artwork to Bored Ape Yacht Club, Yuga
26 further argues that these “false equivalences” could deceive reasonable consumers.
27 Dkt. No. 53 at 21.
28

1 Yuga's Opposition Brief conveniently ignores instances where Defendants
2 expressly distinguished between RR/BAYC and Bored Ape Yacht Club. The
3 Complaint alleges that Mr. Ripps set up a website for his RR/BAYC NFT collection
4 (<https://rrbayc.com>) and, on its main page, informed potential consumers that the
5 RR/BAYC project is satirical and uses appropriation to criticize Yuga and shed light
6 on nature of NFTs. Dkt. No. 1 ¶¶ 34, 48. The Complaint further alleges that Mr.
7 Ripps explained in a May 25th tweet that collectors can purchase RR/BAYC NFTs on
8 his website to protest Yuga's use of racist and neo-Nazi messaging. Dkt. No. 1 ¶ 53.
9 Yuga also admits that the website required consumers to acknowledge a disclaimer
10 explaining that RR/BAYC NFTs are not associated with Yuga. Dkt. No. 53 at 16.
11 Thus, according to the allegations in the Complaint, Mr. Ripps and Mr. Cahen's
12 representations regarding the nature of the RR/BAYC artwork were not misleading.

13 **F. Yuga's Dropped Unjust Enrichment Claim Should Be Stricken**

14 Because Yuga has stated in its Opposition Brief that it has withdrawn its unjust
15 enrichment claim (but has not actually amended its Complaint), Defendants' motion to
16 strike it on anti-SLAPP grounds is unopposed and should be granted.

17 **G. Yuga's Conversion Claim Is Not Cognizable**

18 Yuga admits that its conversion claim rests on the premise that Defendants have
19 misappropriated Yuga's trademarks. But as outlined in Defendants' initial brief and
20 herein, Yuga has failed to plead an actionable claim of trademark infringement and,
21 therefore, failed to establish a wrongful disposition of property necessary for
22 conversion. *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) (to state a claim
23 for conversion you must allege "right to possession of property, wrongful disposition
24 of the property right and damages.") (internal citation and quotation omitted).

25 But even if Yuga had pleaded an actionable trademark infringement claim, its
26 conversion claim should still be dismissed. Although courts have "split on whether
27 [conversion] is a cognizable claim" in the trademark context (*Nam v. Alpha Floors*,
28

1 Inc., No. 216CV6810JLSJCGX, 2017 WL 11635994, at *8 (C.D. Cal. Jan. 4, 2017)),
2 the Court here should follow those cases that have found that the application of
3 conversion to intangible property “should not be expanded to displace other, more
4 suitable law.” Tethys Bioscience, Inc. v. Mintz, No. 09-5115, 2010 WL 2287474, at
5 *7 (N.D. Cal. June 4, 2010) (internal citation and quotation omitted). Accordingly,
6 Yuga’s should not be able to use conversion to supplant its trademark-related claims,
7 which better address the nature of trademarks, the interests at stake, and the
8 appropriate determination of remedies.

9 **H. Yuga’s Intentional and Negligent Interference Claims Are Deficient**

10 Yuga’s Opposition provides no additional factual information regarding its
11 intentional interference and negligent interference claims. Yuga largely rests on the
12 arguments they already made in their Complaint and, thus, fails to plausibly allege
13 intentional interference or negligent interference. Specifically, Yuga attempts to use
14 their trademark infringement claims (Claims 1-7) to meet many of the elements of
15 their interference claims (such as independent wrongful acts). Dkt. No. 53 at 22-23.
16 But this attempt fails because, as stated above, Yuga has not plausibly alleged its
17 trademark-related claims.

18 Yuga also ignores Defendants’ argument that it is insufficient to plead a
19 “market theory” of liability by suggesting that Defendants generally disrupted Yuga’s
20 relationship with the entire market of BAYC customers. Dkt. No. 48 at 24 (citing
21 Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008)).
22 Instead, Yuga simply concludes, without citing any allegations, that their Complaint
23 “sufficiently alleges a business relationship with Bored Ape holders.” Dkt. No. 53 at
24 22. Yuga then cites to Settimo Assocs. v. Environ Sys., Inc., 14 Cal. App. 4th 842, 846
25 (1993) to argue that “California law does not prohibit alleging loss of customers for
26 intentional interference claims.” Dkt. No. 53 at 22. But *Settimo Associates* dealt with
27 a competitive bidding process among sub-contractors and is completely silent on
28

1 whether interference claims apply to the general market of costumers. *Settimo*
 2 *Assocs.*, 14 Cal. App. 4th at 845. Further, Yuga has yet to allege more than
 3 conclusory statements about their loss of customers. *See* Dkt. No. 1 ¶¶ 145, 157.

4 **I. Yuga's Substantive Arguments in Its Objections to Defendants' Exhibits Should Be Rejected**

5 Yuga's objections should be ignored (if not stricken outright) for violating the
 6 Local Rules and this Court's Standing Order, which make clear that "oppositions to
 7 motions shall not exceed 25 pages." Dkt. No. 14 at ¶ 5(c); L.R. 11-6. Courts in this
 8 district recognize that litigants may not circumvent these page limits by making
 9 multiple filings. *Vaccarino v. Midland Nat. Life Ins. Co.*, No. 2:11-CV-05858-CAS,
 10 2014 WL 572365, at *4 (C.D. Cal. Feb. 3, 2014); *New Show Studios LLC v. Needle*,
 11 No. 2:14-CV-01250-CAS, 2014 WL 2988271, at *1 (C.D. Cal. June 30, 2014). Here,
 12 in addition to Yuga's 25-page Opposition Brief, Yuga has filed a 51-page objection
 13 that packages substantive arguments that should have been in the Opposition Brief.
 14 For example, the objection raises arguments about (1) the veracity of Defendants'
 15 accusations of racism, (2) the relevance of Defendants' critical commentary to the
 16 RR/BAYC project, (3) whether the RR/BAYC project is artistic expression,
 17 (4) whether the court should take judicial notice of public documents, and (5) which
 18 documents have been incorporated by reference in the Complaint. *See, e.g.*, Dkt. No.
 19 54 at 1-3, 8-9, 13, 14, 15, 17. At a minimum, Yuga should have sought leave of Court
 20 before filing such extensive additional briefing.

21 In any event, there was nothing improper about Defendants' use of exhibits in
 22 their motion. Defendants request relief from this Court based solely on the allegations
 23 in the Complaint and documents the Complaint incorporated by reference, such as
 24 <https://rrbayc.com>, <https://etherscan.io/address/0x2ee6af0dff3a1ce3f7e3414c52c48fd50d73691e>, and <https://apemarket.com/>. *See* Dkt. No. 1 ¶¶ 34, 36, 39, 46, 48, 81; *see also* *Halle Props., L.L.C. v. Bassett*, No. 06-cv-7694-ABC-JWJ, 2007 WL 2344931, at *6 (C.D. Cal. Aug. 14. 2007) ("a court may consider documents which are not

1 physically attached to the complaint but ‘whose contents are alleged in [the] complaint
 2 and whose authenticity no party questions.’’’); *Gotham Ins. Co. v. Shasta Techs., LLC,*
 3 No. 13-cv-3810-PJH, 2014 WL 1347766, at *3 (N.D. Cal. April 3, 2014) (“[T]he
 4 court may consider … documents referenced extensively in the complaint and
 5 documents that form the basis of the plaintiff’s claims.”).

6 Defendants attached additional exhibits to their motion only as background
 7 information and context to the First Amendment-protected activity in this case, as is
 8 typical for anti-SLAPP motions at the pleadings stage.² *See, e.g., Tensor Law P.C. v.*
 9 Rubin, 2019 WL 3249595, at *4 (C.D. Cal. April 10, 2019) (“Although the Court
 10 provided an overview of Defendant’s account of the facts in this Order, the Court need
 11 not refer to any of the evidence submitted by Defendant in deciding whether Plaintiff
 12 has set forth a legally sufficient claim against Defendant.”); *Garcia v. Allstate Ins.*
 13 1:12-cv-00609-AWI-SKO, 2012 WL 4210113, at *14 (E.D. Cal. Sep. 18, 2012)
 14 (granting anti-SLAPP motion at the pleadings stage “[b]ased on consideration of the
 15 declarations, pleadings, and exhibits to the present motion.”).

16 III. CONCLUSION

17 For the reasons set forth above, Yuga’s objections (Dkt. No. 54) should be
 18 stricken under the Local Rules and Standing Order, Yuga’s state law claims (Claims
 19 4-11) should be stricken under the California anti-SLAPP statute, and Yuga’s federal
 20 law claims (Claims 1-3) should be dismissed pursuant to Federal Rule 12(b)(6).

21
 22
 23 ² It is routine practice to use exhibits in an anti-SLAPP motion at the pleadings stage
 24 when those exhibits solely serve as background information for the accused First
 25 Amendment activity and not as grounds for relief. *See e.g., Tatiana Sauquillo v.*
 26 *California Highway Patrol, No. 2:19-cv-07651* (C.D. Cal. Sep 11, 2019) (Dkt. No.
 27 11); *Word Aflame Tabernacle, Inc. v. City of La Habra Heights, No. 2:20-cv-09899*
 28 (C.D. Cal. Nov 5, 2021) (Dkt. Nos. 88, 90, 91); *Scottsdale Ins. Co. v. Grant & Weber,*
 No. 2:16-cv-00610 (C.D. Cal. Feb 17, 2017) (Dkt. Nos. 106, 107).

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1 Dated: October 24, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all attorneys of record via the Court's ECF system on October 24, 2022.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

YUGA LABS, INC.,
Plaintiff,
v.
RYDER RIPPS, JEREMY CAHEN, and
DOES 1-10,
Defendants.

Case No.: 2:22-cv-04355-JFW-JEM
**YUGA LABS, INC.'S OPPOSITION
TO DEFENDANTS' MOTION TO
STRIKE AND DISMISS**
Date: Nov. 7, 2022
Time: 1:30 p.m.
Dept: Courtroom 7A
Judge: Honorable John F. Walter

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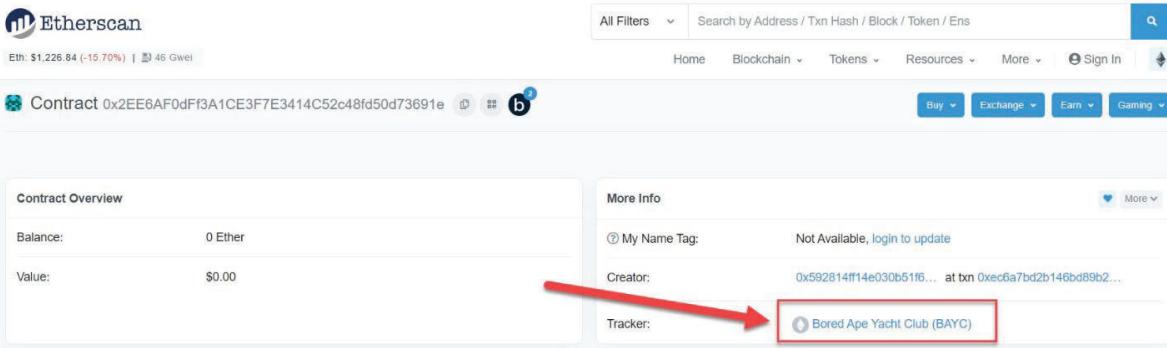
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1 **I. INTRODUCTION**

2 Defendants' scam has explicitly misled consumers into thinking that their NFTs
 3 ("non-fungible tokens" or "tokens") are affiliated, sponsored, or associated with Yuga
 4 Labs. Worse still: they intentionally cultivated and relished in the harm they caused
 5 by this confusion. Defendants do not dispute that they are using Yuga Labs' BAYC
 6 Marks to sell identical NFT products on the same marketplaces Yuga Labs sells its
 7 NFTs. This is textbook trademark infringement and explicitly misleading use of these
 8 marks. *See Gordon v. Drape Creative, Inc., 909 F.3d 257, 269-271 (9th Cir. 2018).*

9 Facing the Complaint's undisputed allegations of trademark infringement,
 10 Defendants cower behind their argument that their willful infringement is protected
 11 "art." But the First Amendment does not protect scams designed to mislead
 12 consumers. And, Defendants' actions are pure commerce, not protected speech. They
 13 are using Yuga Labs' trademarks to sell their own competing products, trading off of
 14 Yuga Labs' goodwill, and misleading consumers about the source and features of
 15 their products. If Defendants' motion is not denied, it would "turn trademark law on
 16 its head" (*id.* at 270) and allow anyone to rebut trademark infringement claims with
 17 the flimsy and false claim that the infringement is "art."

18 In just one example of Defendants' intentional and explicitly misleading
 19 trademark infringement, they marked their NFT's token tracker—which is used to
 20 help consumers verify the source of an NFT—with Yuga Labs' trademarks: "Bored
 21 Ape Yacht Club (BAYC)." Compl. ¶ 39.

22 

23 The screenshot shows the Etherscan interface with the following details:

- Contract Overview:**
 - Balance: 0 Ether
 - Value: \$0.00
- More Info:**
 - My Name Tag: Not Available, login to update
 - Creator: 0x592814ff14e030b51f6... at tx 0xec6a7bd2b146bd89b2...
 - Tracker: Bored Ape Yacht Club (BAYC) (highlighted with a red arrow)

24 There is no commentary on this page. There is no art. There is not even a reference

1 to Defendants. Yuga Labs' trademark is the only trademark that consumers see to
2 identify the source of Defendants' competing product.

3 Defendants' trademark infringement has caused, and continues to cause, actual
4 confusion. Yuga Labs states a claim for trademark infringement, and Defendants'
5 purported defenses provide no escape.

6 Along with its trademark infringement claims, Yuga Labs sufficiently pled its
7 cybersquatting, false advertising, unfair competition, conversion, tortious
8 interference, and unjust enrichment claims. Defendants registered and use, in bad
9 faith, Yuga Labs' trademarks in the rrbayc.com and apemarket.com domains.
10 Defendants falsely advertised that their infringing products were equivalent to Yuga
11 Labs' authentic products to further scam consumers into buying their copycat NFTs.
12 And Defendants interfered with Yuga Labs' actual and prospective economic
13 advantage through trademark infringement, unfair competition, false advertising, and
14 offering fake Yuga Labs NFTs.

15 With their motion, Defendants shirk from their infringing conduct by hiding
16 behind the same false claims against Yuga Labs' founders that they peddle on social
17 media. The Court is not a sounding board for their bogus claims; this is not a
18 defamation lawsuit, and Defendants' offensive and false accusations against Yuga
19 Labs' founders are not the basis for any claim in this lawsuit. Yuga Labs' founders
20 will personally continue to respond to those actions in the public forum. In this Court,
21 Yuga Labs seeks relief from Defendants' explicit misleading of consumers through
22 their infringement of BAYC Marks.

23 **II. FACTUAL BACKGROUND**

24 **A. Yuga Labs' Allegations Accepted as True**

25 Defendants have scammed consumers into buying RR/BAYC NFTs by
26 misusing Yuga Labs' trademarks. Compl. ¶ 2. The RR/BAYC NFTs are merely a
27 re-packaging of the exact same images underlying Yuga Labs' authentic BAYC
28 NFTs. *Id.* Brazenly, Defendants promote and sell these RR/BAYC NFTs using the

1 very same trademarks that Yuga Labs uses to promote authentic Bored Ape NFTs in
2 the exact same marketplaces where Bored Ape NFTs are sold. *Id.* ¶¶ 2, 33. Even
3 worse, Defendants market these copycats as falsely equivalent to authentic Bored Ape
4 NFTs. *Id.* ¶ 2.

5 **1. Yuga Labs Alleges a Likelihood of Consumer Confusion.**

6 Defendants' motion admittedly does not challenge that Yuga Labs adequately
7 alleges a likelihood of confusion from their use of BAYC Marks. Decl. of Louis
8 Tompros (Dkt. 36) ("Tompros Decl.") ¶ 6. Yuga Labs' "slam-dunk evidence of a
9 conceptually strong mark together with the use of identical marks on identical goods"
10 proves likelihood of confusion and infringement. *Stone Creek, Inc. v. Omnia Italian*
11 *Design, Inc.*, 875 F.3d 426, 436 (9th Cir. 2017) (abrogated on other grounds).

12 Defendants do not deny "the strength of the mark[s]," nor that Yuga Labs has
13 the exclusive right to use them. Compl. ¶¶ 23-32. As for the "relatedness of the
14 goods," Defendants concede that they are selling the same type of product (NFTs)
15 with the identical underlying Bored Ape images. Mot. at 6 ("The RR/BAYC project
16 is a collection of NFTs that point to the same online digital images as the BAYC
17 collection[.]"); *see also* Compl. ¶ 33. This is especially misleading to consumers who
18 see what appears to be a Yuga Labs NFT displaying BAYC Marks. *Id.* ¶ 2. The
19 "similarity of the marks" is indisputable, and Defendants concede that they used
20 BAYC Marks, without modification in most instances, to sell RR/BAYC NFTs. Mot.
21 at 18 ("Mr. Ripps's [sic] used BAYC's marks"); *see generally*, Compl. ¶¶ 33-
22 47. Ripps himself "gloated that it is consumers' own fault for being confused by his
23 fake NFTs, even though Ripps' actions lay bare that he welcomes the confusion." *Id.*
24 ¶ 40. Defendants concede they sold their copycat NFTs using the same "marketing
25 channels" as Yuga Labs. Mot. at 15-16; Compl. ¶ 33. RR/BAYC NFTs were even
26 repeatedly removed from OpenSea, Foundation, and other marketplaces, as those
27 marketplaces sought to protect their users from Defendants' explicitly misleading
28 activities. *See id.* ¶¶ 33 n.1, 35-37, 54. Finally, Defendants concede that their intent

1 in using Yuga Labs' marks was to identify the BAYC collection—even though they
2 were not selling genuine Yuga Labs products. Mot. at 18; *see also* Compl. ¶ 52.

3 **2. Yuga Labs Pleads Multiple Examples of Explicitly
4 Misleading Activity Leading to Actual Confusion.**

5 Beyond creating a likelihood of confusion, Defendants' use of BAYC Marks is
6 explicitly misleading. Defendants "do not distinguish their use of Yuga Labs' BAYC
7 Marks from the identical look, sound, and commercial impression of" BAYC Marks
8 and "promote[] and sell[] these RR/BAYC NFTs using *the very same trademarks* that
9 Yuga Labs uses to promote and sell authentic Bored Ape Yacht Club NFTs." Compl.
10 ¶¶ 2, 47. This explicitly misleading conduct exacerbates Defendants' other uses of
11 BAYC Marks "to trade on Yuga Labs' goodwill and confuse consumers" (*id.* ¶ 42),
12 such as their misleading uses of BAYC Marks to promote RR/BAYC NFTs on Twitter
13 (*id.* ¶ 42-46), their Ape Market NFT marketplace (*id.* ¶ 46), and the rrbayc.com
14 website (*id.* ¶ 34), among others.

15 More specifically, Defendants "use[] every opportunity to make these
16 RR/BAYC NFTs resemble the authentic Bored Ape NFTs as closely as possible to
17 confuse consumers into buying them." *Id.* ¶ 52. As Defendants admit, the images
18 underlying the RR/BAYC NFTs are purposefully *identical* to those used in Yuga
19 Labs' BAYC NFTs, and contain BAYC Marks within the images. *Id.* ¶ 34; Decl. of
20 Ryder Ripples (Dkt. 48-1) ("Ripples Decl.") ¶ 8. RR/BAYC #362 is one such copycat
21 example; it uses the BAYC, BA YC Logo, and Ape Skull Logo marks. Compl. ¶ 34.
22 Relatedly, Defendants' use of Yuga Labs' "unique number[ing]" to identify and sell
23 their RR/BAYC NFTs reflects Defendants' intentional effort to make their knockoff
24 NFTs resemble Bored Ape NFTs in every possible way. *Id.* ¶ 52. Further evidencing
25 Defendants' efforts to explicitly mislead consumers, Defendants marked the token
26 tracker of their product with Yuga Labs' trademarks: "Bored Ape Yacht Club
27 (BAYC)." *Id.* ¶ 39. Token trackers are "important for validating the authenticity of
28 an NFT." *Id.* ¶¶ 39, 40. So, Defendants made their competing product look identical

1 to Yuga Labs', and in the place where a consumer could authenticate and check who
2 created the NFT, (the token tracker), Defendants used Yuga Labs' trademarks to
3 ensure the consumer was explicitly misled.

4 Defendants also sell these RR/BAYC NFTs on the same NFT marketplaces that
5 Bored Ape NFTs are sold and under the same marks. *Id.* ¶ 33. For example,
6 Defendants' "Foundation page was also deliberately misleading and confusing to
7 consumers and used Yuga Labs' BAYC marks in an attempt to trick community
8 members into buying their NFTs instead of the official BAYC NFTs." *Id.* ¶ 37. On
9 this page, Defendants "prominently and confusingly used Yuga Labs' BORED APE
10 YACHT CLUB trademark as the title of the page" and "used Yuga Labs' BAYC
11 trademark in an unauthorized hyperlink labeled 'BAYC' and in the URL of the page."
12 *Id.* "[E]ven the top result in a Google search for 'BAYC Foundation.app' or 'Bored
13 Ape Yacht Club Foundation.app' was a misleading link titled 'Bored Ape Yacht Club
14 – Foundation.app' that redirected to the fake RR/BAYC NFT collection." *Id.* When
15 users hovered over the NFTs on this Foundation page, "the page displayed a miniature
16 version of their warped BA YC BORED APE YACHT CLUB Logo mark. At such a
17 small size, it is difficult for a consumer to tell the difference" between this knockoff
18 and the real thing. *Id.* ¶ 38. Defendants' OpenSea pages, and other marketplaces,
19 were also explicitly misleading by using "Yuga Labs' BAYC trademark in the title of
20 the page, in the cover photo of the page, and in the page URL[.]" *Id.* ¶¶ 35-36, 41.
21 Defendants even falsely claim that they own a trademark registration for RR/BAYC
22 to explicitly mislead consumers about the legitimacy of their NFTs. *See id.* ¶ 46.

23 Defendants' intentional and explicitly misleading activities detailed in the
24 Complaint were part of their efforts to profit from using Yuga Labs' exact marks to
25 sell NFTs that ordinary consumers could have—and indeed have—mistaken for
26 genuine BAYC NFTs.

27 **III. LEGAL STANDARD**

28 "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks

1 a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
 2 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In
 3 reviewing the plausibility of a complaint, courts “accept factual allegations in the
 4 complaint as true and construe the pleadings in the light most favorable to the
 5 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
 6 1031 (9th Cir. 2008). “As a general rule, ‘a district court may not consider any
 7 material beyond the pleadings in ruling on a Rule 12(b)(6) motion.’” *Lee v. City of*
 8 *Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (cleaned up).

9 California’s anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, “does not apply
 10 to federal law causes of action.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th
 11 Cir. 2010). The threshold issue on an anti-SLAPP motion to strike state-law claims
 12 is whether Defendants made “a prima facie showing that the lawsuit arises from an
 13 act in furtherance of its First Amendment right to free speech.” *Nat'l Abortion Fed'n*
 14 *v. Ctr. for Med. Progress*, No. 15-cv-03522, 2015 WL 5071977, at *3 (N.D. Cal. Aug.
 15 27, 2015). However, “[a]llegations of protected activity that merely provide context,
 16 without supporting a claim for recovery, cannot be stricken under the anti-SLAPP
 17 statute.” *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th 995, 1012 (2021). If the movant
 18 clears this first hurdle, then the plaintiff must “show a reasonable probability that it
 19 will prevail on its claim.” *Wisk Aero LLC v. Archer Aviation Inc.*, No. 21-cv-02450,
 20 2021 WL 4932734, at *4-5 (N.D. Cal. Sept. 14, 2021). Where, as here, Defendants
 21 contend that the claims are legally deficient, the court applies a Rule 12(b)(6) standard
 22 of review. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890
 23 F.3d 828, 834 (9th Cir. 2018), amended, 897 F.3d 1224 (9th Cir. 2018). And where,
 24 as here, Yuga Labs’ complaint clearly states a claim, the anti-SLAPP motion fails.¹

25
 26 ¹ Judges on the Ninth Circuit have at times called on the court to reconsider whether
 27 federal courts apply the anti-SLAPP statute. See, e.g., *Makaeff v. Trump Univ., LLC*,
 28 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring). And the Second, Fifth,
 and Eleventh Circuits have rejected the application of anti-SLAPP statutes in federal
 court. Yuga Labs reserves its argument that the anti-SLAPP statute is inapplicable in
 federal court.

1 **IV. ARGUMENT**

2 **A. Defendants' Infringing NFTs Are Not Protected Speech.**

3 Defendants may not use BAYC Marks to sell NFTs that admittedly use Yuga
4 Labs' images (with no expressive content or transformation) in the sale of the same
5 goods (NFTs) and on the same marketplaces where Yuga Labs' NFTs are sold. This
6 is true notwithstanding that Defendant Rипps is a claimed artist intent on publicizing
7 falsehoods about Yuga Labs' founders, and it is undeniably true as to Defendant
8 Cahen who makes no claim to creating any art. If the Court accepts Defendants'
9 argument that the trademark infringement *is* the art, it would create a gaping loophole
10 in trademark law, as any street corner counterfeiter, and even direct business
11 competitors, could sell knockoff products by claiming their sale is performance and
12 appropriation art. But just like common counterfeiters, Defendants' sale of
13 RR/BAYC NFTs is a purely commercial enterprise which they use to profit off of
14 Yuga Labs' goodwill. This is commercial infringement; not art.

15 Defendants argue for an exemption for their infringement because some who
16 bought an RR/BAYC NFT supposedly knew it was fake. Mot. at 7-8. This is a factual
17 issue the Court cannot resolve on a motion to dismiss. Regardless, even if someone
18 knows they are buying a knockoff, the sale still infringes. See Chanel, Inc. v. Hsiao
19 Yin Fu, No. 16-cv-02259, 2017 WL 1079544, at *4 (N.D. Cal. Mar. 22, 2017) (finding
20 infringement even if purchasers of counterfeit Chanel handbags "know that they are
21 [] purchasing nongenuine goods"). Thus, even if some purchasers knew the
22 RR/BAYC NFTs were fake, Defendants' use of BAYC Marks infringed Yuga Labs'
23 rights because Defendants traded on Yuga Labs' goodwill and explicitly misled other
24 consumers through both initial interest and post-sale confusion. See Brookfield
25 Commc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1062 (9th Cir. 1999); ACI
26 Int'l. Inc. v. Adidas-Salomon AG, 359 F. Supp. 2d 918, 921 (C.D. Cal. 2005).

1. Defendants' Infringing NFTs Are Not "Expressive Works" and Do Not Warrant Application of the *Rogers* Test.

3 The Ninth Circuit only applies the *Rogers v. Grimaldi* analysis when “artistic
4 expression is at issue,” requiring defendants to make a “threshold legal showing that
5 its allegedly infringing use is part of an expressive work protected by the First
6 Amendment.” [*Gordon*, 909 F.3d at 264](#); *see also Rogers v. Grimaldi*, 875 F.2d 994,
7 [999 \(2d Cir. 1989\)](#). Defendants’ sale of a “collection of NFTs that point to the same
8 online digital images as the BAYC collection, but use verifiably unique entries on the
9 blockchain” (Mot. at 6) is not an expressive work protected by the First Amendment,
10 and applying *Rogers* is improper.

In particular, the RR/BAYC NFTs do not express an idea or point of view. They are merely tokens that “point to the same online digital images associated with the BAYC collection.” Mot. at 18-19. Even Defendants’ token tracker uses an exact copy of Yuga Labs’ mark—**with no expressive content**. Compl. ¶¶ 39-40. Likewise, Defendants’ NFT marketplace sales, copycat Twitter accounts, and Ape Market contain no “artistic expression or critical commentary.” *Id.* ¶¶ 33, 37, 42-45, 46. For example, the title of their Foundation sales page was simply “Bored Ape Yacht Club” (*id.* ¶ 37), and googling “BAYC Foundation.app” resulted in a misleading link entitled “Bored Ape Yacht Club – Foundation.app” that redirected to Defendants’ Foundation sales page. *Id.* The Ape Market website used a skull logo identical to Yuga Labs’ skull logo and was established “solely to sell their RR/BAYC NFTs alongside authentic Yuga Labs NFTs.” *Id.* ¶ 46, 55. These are all commercial activities to sell infringing products. Defendants even concede that Ape Market contained no speech because it “never had any content.” Mot. at 17.

25 The only claimed expression Defendants point to comes from material beyond
26 the Complaint. Indeed, Defendants filed two improper declarations and thirty-six
27 exhibits to try to connect their defamation of Yuga Labs' founders to their unfair
28 competition with Yuga Labs because the Complaint itself does not put those matters

1 at issue. Defendant Ripps' so-called criticism is not the subject of the Complaint and
 2 is readily separated from the sales and marketing of RR/BAYC NFTs. For instance,
 3 although Defendant Ripps' improper declaration cites his false assertions about Yuga
 4 Labs' founders, that same declaration separates those assertions from his creation of
 5 the infringement of Yuga Labs' marks. *See* Ripps Decl. ¶¶ 5-9.²

6 Defendants' sale and promotion of the RR/BAYC NFTs is merely a business
 7 venture to trade on Yuga Labs' brand value, resulting in a massive windfall for
 8 Defendants. Their sale of RR/BAYC NFTs is no more artistic than the sale of a
 9 counterfeit handbag, making the *Rogers* test inapplicable. *See, e.g., Tommy Hilfiger*
 10 *Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 415 (S.D.N.Y. 2002)
 11 (holding *Rogers* test inapplicable when trademark was "being used at least in part to
 12 promote a somewhat non-expressive, commercial product").

13 **2. Defendants' Sale of Infringing RR/BAYC NFTs Are Not
 14 "Protected Activity" Under California's Anti-SLAPP Law.**

15 For similar reasons, Defendants' sale of infringing NFTs is not "protected
 16 activity" under the anti-SLAPP statute because Defendants fail to show that Yuga
 17 Labs' lawsuit arises from an act in furtherance of Defendants' "First Amendment right
 18 to free speech." *Nat'l Abortion Fed'n*, 2015 WL 5071977, at *3. It is not enough for
 19 an anti-SLAPP movant to identify the existence of allegedly protected activity; the
 20 protected activity must at least partially form the basis of the claim. *See Jordan-Benel*
 21 *v. Universal City Studios, Inc.*, 859 F.3d 1184, 1190, 1193 (9th Cir. 2017) ("[E]ven if
 22 a defendant engages in free speech activity that is relevant to a claim, that does not
 23 necessarily mean such activity is the basis for the claim.").

24 Here, Defendants' so-called "speech" is separate from the infringing NFT sales.
 25 *See* Ripps Decl. ¶¶ 5-9; *see also supra* § IV.A.1. More importantly, the lawsuit does
 26

27 ² If the Court considers Defendants' improper evidence of their attacks against Yuga
 28 Labs' founders, this factual dispute about how to define their commercial activity
 warrants denial of their motion to allow for discovery and expert testimony.

1 not arise out of Defendants' speech; it arises out of their garden-variety trademark
2 infringement. Indeed, the Complaint does not seek to enjoin Defendants' defamatory
3 speech. The anti-SLAPP motion fails at the outset for this reason. Additionally, the
4 motion is deficient on several other grounds.

5 **First**, Defendants offer no argument that Cahen's activities were in furtherance
6 of any expression. *See, e.g.*, Mot. at 1 ("Yuga sued Mr. Ripps not for defamation, but
7 for trademark infringement."). Therefore, the motion must fail as to him.

8 **Second**, Defendants have not shown that the *sale and marketing* of thousands
9 of infringing NFTs is protected activity. Any speech involved in the sale and
10 promotion of NFTs is *commercial* speech not protected by the anti-SLAPP statute.
11 Indeed, the anti-SLAPP statute contains an explicit exemption for causes of action
12 based on "comparative advertising." *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.
13 5th 133, 147 (2019). And here, Yuga Labs' claims are exempt because Defendants'
14 allegedly protected speech was (1) made when Defendants were selling their NFTs
15 and (2) targeted to potential or actual buyers of BAYC NFTs. *Compare* Cal. Code
16 Civ. Proc. § 425.17(c) (stating that § 425.16 does not apply to certain causes of action
17 against businesses that make statements about the goods, services, or business
18 operations of their competitors) *with* Compl. ¶ 33 ("Defendants . . . use *the very same*
19 *marks* to promote their RR/BAYC NFT collection.") and *id.* ¶¶ 144-145 (Defendants
20 "intentionally sought to . . . appropriat[e] Yuga Labs' trademarks . . . [resulting in]
21 [a]ctual interference with the relationship between Yuga Labs and individuals who
22 have purchased or might purchase Bored Ape NFTs . . ."). But even if not explicitly
23 exempted by § 425.17(c), the heavily commercial nature of Defendants' conduct
24 weighs strongly in favor of finding that any speech associated with the sale is not the
25 kind of public participation contemplated by the anti-SLAPP statute. *FilmOn.com*
26 *Inc.*, 7 Cal. 5th at 148 ("[T]he very contextual cues revealing a statement to be
27 'commercial' in nature—whether it was private or public, to whom it was said, and
28 for what purpose—can bear on whether it was made in furtherance of free speech in

1 connection with a public issue.”). Defendants’ argument posits that *their* trademark
2 infringement is a distinct, protected form of trademark infringement because they are
3 critical of Yuga Labs’ founders. But their NFTs contain no commentary at all. The
4 act of infringement itself is not free speech—even if it is motivated by some criticism
5 of Yuga Labs’ founders—it is an infringing scheme to profit from the popularity of
6 Bored Ape NFTs.

7 **Third**, even if Ripps engaged in *some* protected activity (Defendants make no
8 argument that Cahen did), that activity is merely incidental to infringement.
9 Defendants “must identify the acts alleged in the complaint that [they] assert[] are
10 protected and what claims for relief are predicated on them.” *Bonni*, 11 Cal. 5th at
11 1010. “[C]ollateral or incidental allusions to protected activity will not trigger
12 application of the anti-SLAPP statute.” *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal.
13 App. 4th 1264, 1272 (2009); *see also DTS, Inc. v. Nero AG*, No. 14-cv-9791, 2015
14 WL 12811268, at *3 (C.D. Cal. Dec. 3, 2015) (“The mere fact that a claim was
15 triggered by protected activity or filed after protected activity took place does not
16 mean that the claim arose from that activity for purposes of the anti-SLAPP statute.”)
17 (cleaned up). Defendants base their motion not on any claim in the Complaint, but
18 on a theory that this trademark case is pretextual or retaliatory. Yet despite months
19 of peddling his false claims, Yuga Labs only sued Ripps (among others) when he and
20 others sold thousands of RR/BAYC NFTs using BAYC Marks. As Defendants
21 acknowledge, “Yuga sued Mr. Ripps not for defamation, but for **trademark**
22 infringement.” Mot. at 1. “The anti-SLAPP statute cannot be read to mean that any
23 claim asserted in an action which arguably was filed in retaliation for the exercise of
24 speech or petition rights falls under section 425.16, whether or not the claim is *based*
25 *on* conduct in exercise of those rights.” *City of Cotati v. Cashman*, 29 Cal. 4th 69, 77
26 (2002) (cleaned up).

27 **Fourth**, this trademark case is not appropriate for anti-SLAPP because there is
28 no risk that this lawsuit will chill constitutional rights. Even when a defendant points

1 to allegations in the Complaint that involve protected activity, an anti-SLAPP motion
2 should not be entertained where the allegations about protected activity “are largely
3 superfluous to [the plaintiff’s] primary allegations” and the claims do not risk chilling
4 constitutional rights. *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, 143 F.
5 Supp. 3d 982, 1022 (N.D. Cal. 2015). Where such allegations “merely provide
6 context,” an anti-SLAPP motion cannot prevail. *Bonni*, 11 Cal. 5th at 1012. Here,
7 Yuga Labs’ primary allegations of trademark infringement do not seek to stifle
8 Defendants’ speech. And indeed, Defendants’ continued false attacks on Yuga Labs’
9 founders demonstrates that they are not stifled.

10 Defendants’ motion to strike Yuga Labs’ state-law claims under California’s
11 anti-SLAPP statute has no merit from the outset and should be denied.

12 **B. Yuga Labs Plausibly Alleges Trademark Infringement.**

13 Defendants do not contend that the Complaint fails to sufficiently allege
14 trademark infringement or deny Yuga Labs’ ownership and priority of the BAYC
15 Marks. By using BAYC Marks to sell identical products to the same consumers on
16 the same markets that Yuga Labs uses, Defendants created confusion that was
17 “explicitly misleading.” *Supra* § II.A.2; *Gordon*, 909 F.3d at 270-71.

18 Defendants’ conduct led to actual confusion, initial interest confusion, and
19 post-purchase confusion. *See Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150,
20 1165 (9th Cir. 2021) (“Evidence of actual confusion by consumers is strong evidence
21 of likelihood of confusion.”); *Brookfield Commc’ns, Inc.*, 174 F.3d at 1062 (Initial
22 interest confusion occurs when the defendant uses the plaintiff’s trademark “in a
23 manner calculated to capture initial consumer attention, even though no actual sale is
24 finally completed as a result of the confusion.”) (cleaned up); *ACI Int’l. Inc.*, 359 F.
25 Supp. 2d at 921 (“The law in the Ninth Circuit is clear that ‘post-purchase confusion,’
26 i.e., confusion on the part of someone other than the purchaser who, for example,
27 simply sees the item after it has been purchased, can establish the required likelihood
28 of confusion under the Lanham Act.”).

1 Defendants cannot debate the wealth of allegations highlighting their
 2 misleading activity establishing a likelihood of confusion and thus Yuga Labs
 3 sufficiently pled its trademark infringement claims. *See, e.g., supra* § II.A.

4 **1. Defendants' Use of BAYC Marks Is Not Artistically
 5 Relevant.**

6 Knowing that they cannot dispute that they have confused consumers,
 7 Defendants grasp at the *Rogers* defense. But even if the *Rogers* defense applies,
 8 Defendants' use of BAYC Marks is not artistically relevant to Ripps' so-called "art"
 9 under the first prong of the *Rogers* test. While there is a low bar for artistic relevance,
 10 it is not infinitely low. For example, in *Twentieth Century Fox Television v. Empire*
 11 *Distribution, Inc.*, 875 F.3d 1192, 1196-97 (9th Cir. 2017), the court found that using
 12 the "Empire" mark in the title of a TV show was artistically relevant, but contemplated
 13 that it would *not* be artistically relevant for a "pretextual expressive work meant only
 14 to disguise a business profiting from another's trademark . . ." *Id.* That is exactly
 15 the situation here: Defendants saw a chance to make money by ripping off NFTs and
 16 calling their scam "performance art." Defendants claim that Yuga Labs "has
 17 conceded" artistic relevance by making oblique references to one of Defendant Ripps'
 18 social media posts and the rrbayc.com website in the Complaint. Mot. at 14. Not so.
 19 At most, they show Ripps' weak attempts to justify his infringements while
 20 commercially promoting them. This factual dispute may be resolved only after the
 21 Defendants' motion is denied.

22 **2. Defendants' Use of BAYC Marks Is Explicitly Misleading.**

23 Yuga Labs sufficiently pled that Defendants' use of its trademarks is explicitly
 24 misleading under the *Rogers* test. The two considerations relevant to whether a mark
 25 is explicitly misleading are (1) "the degree to which the junior user uses the mark in
 26 the same way as the senior user" and (2) "the extent to which the junior user has added
 27 his or her own expressive content to the work beyond the mark itself." *Gordon*, 909
 28 F.3d at 270-71. In *Gordon*, the Court analyzed these factors and found that

1 defendant's use of plaintiff's trademarked phrase in greeting cards involved minimal
 2 artistic expression, and using it in the same way that plaintiff was using it created a
 3 triable issue of fact on this point. *Id.* at 271. As shown above (*supra* § II.A.2),
 4 Defendants admit they added *zero* expression to BAYC Marks and used them in
 5 *exactly* the same way that Yuga Labs is using them. Ripps Decl. ¶ 8.

6 *Gordon* noted that in prior *Rogers* cases finding that use of a mark was not
 7 explicitly misleading, the junior user employed the mark in different contexts and
 8 markets than the senior users. *909 F.3d at 270*. For example, *Gordon* explained that
 9 in *Twentieth Century Fox* the mark of a record label was used in a television show,
 10 but if it had been used in the same way as the senior user, such as naming the television
 11 show after a preexisting one, “such identical usage could reflect the type of ‘explicitly
 12 misleading description’ of source that *Rogers* condemns.” *Id.* *Gordon* concluded that
 13 “the potential for explicitly misleading usage is especially strong when the senior user
 14 and the junior user both use the mark in similar artistic expressions.” *Id.* This is
 15 exactly what Defendants have done with their NFTs. They used Yuga Labs’ *exact*
 16 *same* marks on the *exact same* marketplaces to identify and sell NFTs bearing the
 17 *exact same* images underlying Yuga Labs’ NFTs. *See, e.g.*, Compl. ¶ 33; *supra*
 18 § II.A.2. Allowing Defendants to use BAYC Marks to market their infringements
 19 would (as the Ninth Circuit observed) “turn trademark law on its head.” *Gordon, 909*
 20 *F.3d at 270*. Indeed, “[i]f an artist pastes Disney’s trademark at the bottom corner of
 21 a painting that depicts Mickey Mouse, the use of Disney’s mark, while arguably
 22 relevant to the subject of the painting, could explicitly mislead consumers that Disney
 23 created or authorized the painting, even if those words do not appear alongside the
 24 mark itself.” *Id.* The same is true here with Defendants’ infringement.

25 *Gordon* also observed that use of a mark is explicitly misleading when the mark
 26 is used “as the centerpiece of an expressive work itself, unadorned with any artistic
 27 contribution by the junior user, which may reflect nothing more than an effort to
 28 induce the sale of goods or services by confusion or lessen the distinctiveness and

1 thus the commercial value of a competitor's mark." *Id. at 271* (cleaned up). Here,
 2 Defendants concede they are using BAYC Marks as the centerpiece of their tokens,
 3 including using "Bored Ape Yacht Club (BAYC)" to identify tokens with the exact
 4 same images Yuga Labs' Bored Ape Yacht Club uses. Mot. at 6. There is no artistic
 5 contribution on their part, and for the most part, the only embellishment they
 6 occasionally add is an "RR" or "Ryder Ripps" in front of BAYC Marks. *See, e.g.*,
 7 Compl. ¶¶ 33-36, 42-43. This spotlight on Yuga Labs' marks solely serves to "induce
 8 the sale of goods or services by confusion." *Gordon, 909 F.3d at 271*.

9 Faced with similar issues in an ongoing, first of its kind, NFT trademark case,
 10 the judge in *Hermes International v. Rothschild* denied defendants' motion to dismiss
 11 Hermes' trademark infringement lawsuit alleging that defendant's "Metabirkins"
 12 NFTs infringed on Hermes' "Birkins" mark. [No. 22-cv-384, 2022 WL 1564597 at *1](#)
 13 ([S.D.N.Y. May 18, 2022](#)). After a thorough *Rogers* analysis, the Court determined
 14 that even though defendant altered the name of the mark (from Birkins to Metabirkins)
 15 and the appearance of the NFT images was different from the real bags, Hermes
 16 alleged sufficient facts of explicit misleadingness to survive a motion to dismiss. *Id.*
 17 [at *7](#). In particular, Hermes alleged the strength of its own mark, evidence of actual
 18 confusion, and the junior user's bad faith in adopting the mark. *Id. at *6*. The
 19 allegations of Defendants' explicitly misleading conduct here is even stronger than in
 20 *Hermes*. Defendants did not even change the mark in many instances, the underlying
 21 images went unaltered, and they advertised the RR/BAYC NFTs, using BAYC Marks
 22 (often without any reference to "RR"), as equivalent to the official BAYC NFTs.
 23 These facts are enough to survive Defendants' motion to dismiss. But Yuga Labs
 24 alleges even more.

25 **First**, the Complaint alleges that Defendants' "fuck off" Tweets highlight that
 26 Defendants wanted to lure people into their knockoff products by using BAYC Marks
 27 and goodwill into purchasing what they falsely claim is an equivalent product.
 28 Compl. ¶¶ 53, 72, 116. That's false advertising and intentional infringement. For

1 purposes of the motion to dismiss, Yuga Labs' interpretation must control here, and
 2 any factual disputes over what these Tweets meant cannot be decided at the motion
 3 to dismiss stage. Even so, the sales pages themselves did not contain criticism, and a
 4 reasonably prudent consumer was likely to be confused, as Defendants intended.

5 **Second**, the existence of a disclaimer on the rrbayc.com reservation site does
 6 not negate the confusion Defendants caused on other websites or other uses of BAYC
 7 Marks where Defendants marketed or sold the infringing NFTs without the
 8 disclaimer. *See, e.g.*, Compl. ¶¶ 35-39. The fact that Defendants felt the need to
 9 include a disclaimer (however ineffectual) demonstrates their awareness that their use
 10 of BAYC Marks was confusing. Even more, sales on NFT marketplaces cause initial
 11 interest confusion, for example, when purchasers who thought they were following
 12 links on Google to official BAYC sales pages were actually going to RR/BAYC sales
 13 pages. Compl. ¶ 37; *see Brookfield Commc'ns, Inc.*, 174 F.3d at 1062. Defendants
 14 likewise caused post-sale confusion when they and other RR/BAYC token holders
 15 displayed them on Twitter and elsewhere as if they were real BAYC NFTs. Compl.
 16 ¶ 53; *see Givenchy S.A. v. BCBG Max Azria Grp., Inc.*, No. CV 10-8394, 2012 WL
 17 3072327, at *6 n.8 (C.D. Cal. Apr. 25, 2012) (even if some consumers were not
 18 confused, post-sale confusion could damage handbag manufacturer where
 19 “consumers can acquire the prestige value of the [handbag] product by buying the
 20 copier’s cheaper imitation.”) (citation omitted).

21 **Third**, Defendants make much of minor changes to the marks including by
 22 *only sometimes* tacking on “RR” before “BAYC.” Mot. at 15-16. But making only a
 23 slight, and occasional, change to a mark is still likely to result in confusion. *See* J.
 24 Thomas McCarthy, McCarthy on Trademarks & Unfair Competition § 23:20 (5th ed.
 25 2018) (“To find trademark infringement only by exact identity and not where the
 26 junior user makes some slight modification would ‘be in effect to reward the cunning
 27 infringer and punish only the bumbling one.’”); *Hard Rock Cafe Licensing Corp. v.*
 28 *Pac. Graphics, Inc.*, 776 F. Supp. 1454, 1462 (W.D. Wash. 1991) (changing the “Hard

1 Rock Cafe” mark to “Hard Rain Cafe” appropriated most of the mark, resulting in
 2 confusion.). And consumers do not necessarily know what “RR” means and could
 3 reasonably assume it is a new product or co-branding. *See Rousselot B.V. v. St. Paul*
 4 *Brands, Inc.*, No. CV190458, 2019 WL 6825763, at *12 (C.D. Cal. July 24, 2019)
 5 (denying motion to dismiss on trademark claims and finding that use of plaintiff’s
 6 trademark “implies that they are part of [plaintiff’s] co-branding program, even
 7 though they are not.”). For example, Yuga Labs has another NFT collection
 8 abbreviated “MAYC” and has marketed with brands like MTV.

9 Likewise, Defendants emphasize Ryder Ripples’ account name on their
 10 Foundation NFT sales page, but it was far overshadowed by the massive text and logo
 11 bearing BAYC Marks.³ Mot. at 16; Compl. ¶ 37. Indeed, Defendants had to blow up
 12 the size of this text in their motion to even show it was there. *Id.* Like Ripples’ initials,
 13 the existence of the name does not conclusively prove that the NFTs came from
 14 another source, and reasonable consumers could assume it is co-branding.

15 Defendants also ignore the many other instances where they used BAYC Marks
 16 with no changes. For example, their Foundation sales page directly co-opted BAYC
 17 Marks in several places. Compl. ¶¶37-38. As the Court in *Kiedis v. Showtime*
 18 *Networks* found, “certainly the potential for [] confusing similarity exists when the
 19 titles are exactly the same” *No. CV078185, 2008 WL 11173143, at *4 (C.D.*
 20 *Cal. Feb. 19, 2008*) (alteration omitted).

21 **Finally**, to the extent there remains any uncertainty about how to interpret
 22 Defendants’ actions, the Court should deny the motion to dismiss because these are
 23 “factual issue[s] not appropriate for resolution without examining the evidence.” *Id.*
 24 at *5 (denying motion to dismiss trademark claims about confusing similarity
 25

26 ³ Contrary to Defendants’ improper screenshots, the RR/BAYC contract did *not* show
 27 Ripples’ name as the “contract creator” when he sold thousands of the infringing NFTs.
 28 *See* Compl. ¶ 39; Mot. at 16. Defendants’ newly manufactured image in the Motion
 appears to be an attempt to mislead the Court as to what the NFT contract looked like
 when Defendants explicitly misled consumers.

1 between song and television show named “Californication.”).

2 **3. Defendants’ Use of BAYC Marks Is Not A Fair Use.**

3 Defendants argue that their use of BAYC Marks is nominative fair use. But
 4 nominative fair use does *not* apply when a defendant uses a mark to “refer[] to
 5 something other than the plaintiff’s product[.]” *New Kids on the Block v. News Am.
 6 Pub., Inc.*, 971 F.2d 302, 308 (9th Cir. 1992). Similarly, nominative fair use only
 7 allows for “truthful use of a mark,” for example a Lexus dealer who sells Lexus
 8 vehicles at lexusbroker.com. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d
 9 1171, 1177 (9th Cir. 2010). Defendants’ use of BAYC Marks is not “truthful” or
 10 referential because Defendants are *not* selling Yuga Labs’ BAYC NFTs. Instead,
 11 Defendants use BAYC Marks to market and sell their own competing knockoff NFTs.
 12 Nor can they claim nominative fair use for their nonidentical modified versions of
 13 BAYC Marks. *See E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095,
 14 1099 (9th Cir. 2008) (nominative fair use defense did not apply when mark was “not
 15 identical to the plaintiff’s” mark). Defendants also improperly raise the nominative
 16 fair use affirmative defense at the motion to dismiss stage, which is “more
 17 appropriately resolved on a motion for summary judgment.” *See Perry v. Brown*, No.
 18 *CV 18-9543, 2019 WL 1452911*, at *12 (C.D. Cal. Mar. 13, 2019) (Walter, J.), *aff’d
 19 and remanded*, *791 F.App’x 643* (9th Cir. 2019) (denying motion to dismiss).

20 Even so, Defendants do not establish each element of the defense. *Dr. Seuss
 21 Enters., L.P. v. ComicMix LLC*, 300 F. Supp. 3d 1073, 1091 (S.D. Cal. 2017)
 22 (defendant’s failure to satisfy all *New Kids* factors warranted denial of their motion to
 23 dismiss). As to the first *New Kids* factor, BAYC has become well-known in the NFT
 24 community and beyond (Compl. ¶¶ 19-22), and contrary to Defendants’ contention,
 25 is readily identifiable without the use of BAYC Marks. For example, the cover of
 26 *Rolling Stone* featured an article with Bored Ape images, titled “*How Four NFT
 27 Novices Created a Billion-Dollar Ecosystem of Cartoon Apes*” that evoked the brand
 28 without infringing BAYC Marks. *Id.* ¶ 19.

1 Second, Defendants did not use BAYC Marks only to the extent reasonably
 2 necessary. Instead, they frequently used the entirety of each mark without
 3 modification to confuse consumers and trade on Yuga Labs' goodwill. In *Toyota*
 4 *Motor Sales*, the court found that defendants' use of not just the Lexus word mark,
 5 but the "stylized Lexus mark and 'Lexus L' logo was more use of the mark than
 6 necessary," where they could "adequately communicate their message without using
 7 the visual trappings of the Lexus brand." [610 F.3d at 1181](#); *see also Summit Ent.,*
 8 *LLC v. B.B. Dakota, Inc.*, No. CV-10-04328, 2011 WL 13216987, at *9 (C.D. Cal.
 9 Nov. 21, 2011) ("extensive use" of film franchise's marks and images were not
 10 reasonably necessary to inform consumers jacket was worn in film). Likewise, here,
 11 Defendants used direct copies of Yuga Labs' BAYC Marks. Compl. ¶¶ 34, 36, 38,
 12 42-44, 46. And Defendants typically used BAYC Marks with Yuga Labs' NFT
 13 images and even mimicked Yuga Labs' social media posts to sell the RR/BAYC
 14 NFTs, further adding to the confusion. *Id.* ¶¶ 33-47. Their infringement was
 15 widespread across numerous social media accounts, NFT marketplaces, and NFT
 16 verification websites. *Id.* This excessive use of "the visual trappings of the [BAYC]
 17 brand" is more than necessary to identify Yuga Labs' NFTs. [Toyota Motor Sales, 610](#)
 18 [F.3d at 1181](#).

19 Finally, Defendants used BAYC Marks "prominently and boldly," to market
 20 the RR/BAYC NFTs, thus "suggesting sponsorship." *Brother Recs., Inc. v. Jardine,*
 21 [318 F.3d 900, 908 \(9th Cir. 2003\)](#); *see supra* § IV.B.2. That Defendants in only some
 22 places criticized Yuga Labs and provided an ineffectual disclaimer does not prove
 23 that a "reasonably prudent consumer" could not be confused, especially where
 24 Defendants' use of BAYC Marks pervaded the stream of commerce. *Supra* § IV.B.

25 **C. Yuga Labs Has Pled Its Additional Federal and State Law Claims.**

26 **1. Yuga Labs Plausibly Alleges Cybersquatting and Unfair**
 27 **Competition.**

28 Defendants' only argument is that Yuga Labs' cybersquatting claim is

1 precluded by *Rogers* and nominative fair use. Mot. at 13, 18. But they cite no case
 2 applying the *Rogers* test to cybersquatting, and the case they do cite is inapposite.
 3 *Calista Enterprises Ltd. v. Tenza Trading Ltd.* merely requires a likelihood of
 4 confusion, which Yuga Labs has sufficiently pled and which Defendants concede. [43](#)
 5 [F. Supp. 3d 1099, 1031 \(9th Cir. 2014\)](#); Compl. ¶¶ 81-82 (Defendants' domain names
 6 are "confusingly similar to Yuga Labs' BAYC and APE marks."); Tompros Decl. ¶ 6.
 7 Likewise, Defendants' citation to *BMW of North America v. Mini Works, LLC* did not
 8 "apply[] nominative fair use to cybersquatting." Mot. at 18. That court only opined
 9 on the bad faith and safe harbor aspects of plaintiff's cybersquatting claim. [463 Fed.](#)
 10 [App'x. 689, 690 \(Fed. Cir. 2011\)](#). In any event, as shown above, these doctrines do
 11 not excuse Defendants' actions. *See supra* § IV.B. The Complaint has adequately
 12 pled cybersquatting. *See* Compl. ¶¶ 77-85.

13 Similarly, Defendants' only argument to dismiss Yuga Labs' unfair
 14 competition claim is that it is precluded by *Rogers* and nominative fair use. Mot. at
 15 13, 18. Because those defenses cannot be decided in Defendants' favor on their
 16 motion, the unfair competition claim must proceed. Even still, Yuga Labs has
 17 sufficiently alleged unfair competition under common law and Cal. Bus. & Prof. Code
 18 § 17200. [Celebrity Chefs Tour, LLC v. Macy's, Inc., 16 F. Supp. 3d 1123, 1138 \(S.D.](#)
 19 [Cal. 2014\)](#) ("The decisive test of common law unfair competition is whether the
 20 public is likely to be deceived about the source of goods or services by the defendant's
 21 conduct."). Defendants' scam deceives consumers. *See* Compl. ¶¶ 99-112; *supra*
 22 § IV.B.

23 **2. Yuga Labs Plausibly Alleges False Advertising.**

24 Here too, Defendants contend that Yuga Labs' false advertising claim fails due
 25 to "deficiencies under the *Rogers* test and nominative fair use." Again, these
 26 inapplicable defenses do not preclude Yuga Labs' claims. *See supra* § IV.B.
 27 Defendants also claim Yuga Labs has not plausibly alleged a misleading
 28 representation of fact in support of its false advertising claim. To the contrary, the

1 Complaint alleges that Defendants “advertised their copycat ‘Ryder Ripps Bored Ape
 2 Yacht Club’ as equivalent to the authentic Bored Ape Yacht Club” and stated, “[y]ou
 3 reserve an ape which you can choose.” Compl. ¶ 72. Defendants’ claims are false.
 4 And these false equivalences could make reasonable consumers “likely to believe that
 5 if they hold one of the RR/BAYC NFTs they will have access to the authentic Bored
 6 Ape Yacht Club (they will not), that they own rights to the underlying art (they do
 7 not), or that they will have access to exclusive launches by Yuga Labs for holders of
 8 authentic Bored Ape NFTs (they will not).” *Id.* ¶ 73. The “fuck off” Tweets do not
 9 “distinguish[]” RR/BAYC NFTs from the official Bored Ape NFTs (Mot. at 21), but
 10 rather falsely advertise their NFTs as a product equivalent to Yuga Labs’ NFTs. Even
 11 Defendants’ incorrect claim that they own a registered trademark for RR/BAYC is
 12 false advertising because it suggests a false equivalence and explicitly misleads
 13 consumers about legitimacy that they simply do not have. *See* Compl. ¶ 46.

14 **3. Yuga Labs Plausibly Alleges Conversion.**

15 Yuga Labs’ conversion claim is legally sufficient because (1) Yuga Labs has
 16 plausibly alleged wrongful disposition of property and (2) courts recognize that
 17 plaintiffs may state a claim for conversion of their trademarks.

18 First, to state a claim for conversion, a plaintiff must allege “right to possession
 19 of property” and “wrongful disposition of the property right[.]” *Kremen v. Cohen,*
 20 337 F.3d 1024, 1029 (9th Cir. 2003). Defendants do not deny the validity or Yuga
 21 Labs’ right to possession of its BAYC trademarks. Yuga Labs alleges that Defendants
 22 “substantially interfered with Yuga Labs’ ownership and rights in [the BAYC] marks
 23 by knowingly or intentionally using them to promote their own [infringing]
 24 RR/BAYC NFTs.” Compl. ¶ 133. This is supported by substantial evidence of
 25 infringement. *See id.* ¶¶ 33-47. Yuga Labs sufficiently pled wrongful disposition.

26 Second, courts in this judicial district recognize claims for conversion of
 27 trademarks. *See* *Jaeyoung Nam v. Alpha Floors*, No. 16-cv-6810, 2017 WL
 28 11635994, at *8 (C.D. Cal. Jan. 4, 2017) (rejecting *Meeker* and concluding that “a

1 plaintiff may state a claim for conversion of a trademark.”). Contrary to Defendants’
 2 misleading citations, the Northern District of California also recognizes claims for
 3 conversion of trademarks. *See Eng. & Sons, Inc. v. Straw Hat Rests., Inc.*, 176 F.
 4 Supp. 3d 904, 923 (N.D. Cal. 2016) (rejecting *Meeker*). Yuga Labs’ trademark
 5 conversion claim is adequately pled.

6 **4. Yuga Labs Plausibly Alleges Intentional Interference.**

7 Yuga Labs’ intentional interference claim is sufficient because it has plausibly
 8 alleged an independently wrongful act and provided examples of actual disruption to
 9 an economic relationship.

10 First, Yuga Labs sufficiently alleges trademark infringement and thus an
 11 independently wrongful act. *See, supra* §§ II.A, IV.B. But aside from trademark
 12 infringement, Yuga Labs also alleges three *additional* independently wrongful acts:
 13 “(b) engaging in unfair competition, (c) engaging in false advertising, and/or
 14 (d) offering a competing fake product to devalue Yuga Labs’ authentic Bored Ape
 15 NFTs and the goodwill associated with them.” Compl. ¶ 144. Each of these
 16 independent acts was wrongful and well-pled. *See, supra* §§ IV.B, IV.C.1-2.

17 Second, the Complaint sufficiently alleges a business relationship with Bored
 18 Ape holders. Contrary to Defendants’ contention, California law does not prohibit
 19 alleging loss of customers for intentional interference claims. Rather, the standard
 20 involves use of “improper methods of disrupting or diverting the business relationship
 21 of another which fall outside the boundaries of fair competition.” *Settimo Assocs. v.*
 22 *Environ Sys., Inc.*, 14 Cal. App. 4th 842, 845 (1993) (emphasis added). Yuga Labs
 23 sufficiently alleges Defendants disrupted their business relationships through unfair
 24 competition. *See supra* §§ IV.B, IV.C.1; Compl. ¶¶ 139-149. Defendants unfairly
 25 competed and infringed by using BAYC Marks to sell copycat NFTs. Compl. ¶ 145.

26 In any event, Yuga Labs also sufficiently alleges actual disruption to economic
 27 relationships with Bored Ape holders. *See id.* ¶¶ 141, 145. These allegations are
 28 based on specific examples and are far from the “conclusory” statement at issue in

1 *Sybersound*. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir.
 2 2008). Yuga Labs can also readily amend to add even more examples.

3 **5. Yuga Labs Plausibly Alleges Negligent Interference.**

4 Yuga Labs sufficiently alleges unreasonable conduct through trademark
 5 infringement and other causes of action, and has demonstrated disruption of existing
 6 business relationships with Bored Ape holders. *See supra* § IV.B.

7 Yuga Labs has also sufficiently pled a special relationship with Defendants.
 8 Specifically, Defendants had a duty not to infringe on Yuga Labs' intellectual
 9 property. Their intentional actions support the existence of a duty. *See Panavision*
 10 *Int'l, L.P. v. Toeppen*, 1996 WL 768036, at *3 (C.D. Cal. Nov. 27, 1996) (denying
 11 motion to dismiss negligent interference claim, taking into account Defendant's intent
 12 to infringe on plaintiff's marks). That Defendants are competitors is distinguishable
 13 from the duty analysis. "Whether a duty is owed is simply a shorthand way of
 14 phrasing what is 'the essential question—whether the plaintiff's interests are entitled
 15 to legal protection against the defendant's conduct.'" *J'Aire Corp. v. Gregory*, 24
 16 Cal. 3d 799, 803 (1979) (quoting *Dillon v. Legg*, 68 Cal.2d 728, 734 (1968)). Here,
 17 Yuga Labs' trademark interests are legally protected from Defendants' infringement.
 18 Notably too, whether the parties are competitors is not one of the criteria under
 19 California law to determine the existence of a duty. *Id.* And caselaw in this district
 20 does not recognize it as one. *See, e.g.*, *Vera Mona, LLC v. Dynasty Grp. USA LLC*,
 21 No. CV202615, 2021 WL 3623297, at *4 (C.D. Cal. Apr. 15, 2021) (finding
 22 competitor who infringed plaintiff's trademark had special relationship sufficient to
 23 support plaintiff's negligent interference claim, and denying motion to dismiss).

24 **6. Yuga Labs' Unjust Enrichment Claim Should Not Be
 25 Stricken by the Anti-SLAPP Statute.**

26 This claim arises from equity and is unrelated to Defendants' purported speech.
 27 *Fed. Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 346 (2008). It is a claim
 28 for profits Defendants made by trading on Yuga Labs' goodwill; the basis for the

1 claim is not Defendants' speech. Moreover, Yuga Labs plausibly alleges trademark
2 infringement (*supra* § IV.B), and has thus shown unjust retention of a benefit.
3 *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000). Yet, given the split of
4 authority in California about whether unjust enrichment is a cause of action, and the
5 Court's prior rulings on this issue, Yuga Labs withdraws this claim but continues to
6 seek unjust enrichment as a remedy. *Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*,
7 992 F. Supp. 2d 962, 981 (C.D. Cal. Jan. 9, 2014) (Walter, J).

8 **D. None of Yuga Labs' Claims May Be Stricken Under California's
9 Anti-SLAPP Law.**

10 Defendants have not established that they are being sued for protected activity,
11 and thus the anti-SLAPP statute does not apply and the motion fails. *Supra* § IV.A.
12 The anti-SLAPP motion also fails because Yuga Labs states a claim for each state-
13 law cause of action. Thus, even if Defendants can establish that their sale of
14 RR/BAYC NFTs is somehow a First Amendment protected activity (which it is not),
15 Yuga Labs' claims easily possess the "minimal merit" needed to survive an anti-
16 SLAPP motion. *See Hilton*, 599 F.3d at 908.

17 Defendants are also not entitled to fees. None of Yuga Labs' claims target
18 Defendants' protected activity—the remedies sought are classic trademark
19 infringement remedies. Any conceivable protected activity is so incidental to these
20 claims as to make application of anti-SLAPP unreasonable. *Episcopal Church Cases*,
21 45 Cal. 4th 467, 478 (2009) ("The additional fact that protected activity may lurk in
22 the background—and may explain why the rift between the parties arose in the first
23 place—does not transform a property dispute into a SLAPP suit."); *see also Hilton*,
24 599 F.3d at 901-02 ("an anti-SLAPP motion requires the court to ask, first, whether
25 the suit arises from the defendant's protected conduct and, second, whether the
26 plaintiff has shown a probability of success on the merits. If the first question is
27 answered in the negative, then the motion must fail, even if the plaintiff stated no
28 cognizable claim."). Additionally, if any state-law claims are dismissed, the partial

1 dismissal will be “so insignificant that [Defendants] did not achieve any practical
2 benefit from bringing the motion,” and such “technical victories” do not entitle
3 Defendants to fees under the statute. *Brown v. Elec. Arts, Inc.*, 722 F. Supp. 2d 1148,
4 1155 (C.D. Cal. 2010). Here, all of Yuga Labs’ federal claims for Defendant’s
5 trademark infringement, which are the core claims at issue, are unaffected by
6 Defendants’ motion to strike.

7 On the other hand, “[i]f the court finds that a special motion to strike is frivolous
8 or is solely intended to cause unnecessary delay, the court shall award costs and
9 reasonable attorney’s fees to a plaintiff prevailing on the motion” Cal. Civ. Proc.
10 Code § 425.16(c)(1). An award of fees for Yuga Labs is particularly warranted here,
11 where Defendants abused the anti-SLAPP statute to air their false assertions against
12 Yuga Labs’ founders and distract from infringing actions they took against Yuga Labs
13 that are the subject of this lawsuit. Indeed, their two declarations with 36 improper
14 and objectionable exhibits reinforces a fee award. *See* Yuga Labs’ Objections to
15 Evidence. Defendants concede their motion is targeted at a non-existent defamation
16 claim; this is a trademark dispute in which the anti-SLAPP statute has no business.

17 **V. CONCLUSION**

18 Defendants’ motion presents no argument requiring the Court to strike or
19 dismiss Yuga Labs’ claims, and it should be denied. If the Court, though, determines
20 that any aspect of Yuga Labs’ Complaint is insufficient, Yuga Labs requests the
21 opportunity to amend its Complaint. Under Rule 15, “court[s] should freely give
22 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2).

23 Dated: October 17, 2022

FENWICK & WEST LLP

24
25 By: /s/ Eric Ball
Eric Ball
26 Attorneys for Plaintiff
YUGA LABS, INC.
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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION
17

18 YUGA LABS, INC.,
19 Plaintiff,
20 v.
21 RYDER RIPPS, JEREMY CAHEN, and
22 DOES 1-10,
23 Defendants.
24

Case No.: 2:22-CV-04355-JFW-JEM
**YUGA LABS, INC.'S OBJECTIONS
TO DEFENDANTS' EVIDENCE
FILED WITH DEFENDANTS'
MOTION TO STRIKE AND
DISMISS**
Date: Nov. 7, 2022
Time: 1:30 p.m.
Dept: Courtroom 7A
Judge: Honorable John F. Walter

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STATUTES AND RULES

Federal Rule of Civil Procedure 12(b)(6).....	<i>passim</i>
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Federal Rule of Evidence 901	<i>passim</i>

1 On October 3, 2022, Defendants filed the declarations of Ryder Rипps and
2 Louis Tompros in support of their Anti-SLAPP Motion to Strike and Motion to
3 Dismiss (“MTS”)—despite knowing that the content of these declarations is false,
4 clearly unrelated to the case at hand, and intended to harass and disparage Yuga Labs’
5 founders. *See* Dkt. 48, 48-1, and 48-3. Yuga Labs hereby objects to portions of, or
6 the entirety of, these declarations, including their exhibits, as set forth below.

7 **I. The Declaration of Ryder Rипps**

8 **A. Objection Number 1**

9 Material Objected To: The entirety of the Declaration of Ryder Rипps.
10 Dkt. 48-1.

11 Grounds for Objection: Yuga Labs objects that Rипps’ declaration lacks
12 foundation. The purported “facts” about Yuga Labs’ founders to which Rипps
13 purports to testify are false, Rипps knows they are false, and Rипps has no factual basis
14 to make them. The facts that are known to Rипps contradict the false claims that he
15 has concocted about Yuga Labs’ founders. Rипps’ knowledge that these claims are
16 false leaves only one conclusion – he is seeking to make a mockery of this case by
17 using Defendants’ filings to harass and disparage Yuga Labs’ founders.

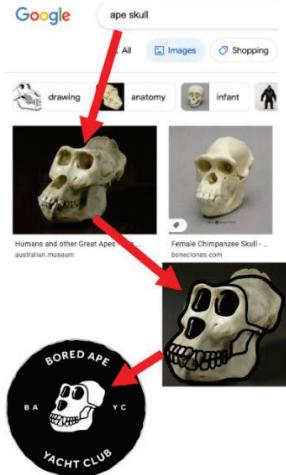
18 Yuga Labs and its founders have publicly explained how Yuga Labs created
19 Yuga Labs’ logo, the art for its NFTs, and the inspiration for its name. Rипps is not a
20 founder of Yuga Labs or in any way connected with the company and thus does not
21 have any personal knowledge as to how and why Yuga Labs created its assets other
22 than what Yuga Labs has shared with the public.

23 But Rипps does not need to take Yuga Labs and its founders’ words for the truth
24 to know that his claims are false. Rипps is well aware of the publicly available emails
25 proving that the inspiration for the BAYC logo was a combination of maritime club
26 patches, punk rock designs, streetwear, and skating culture. *See*
27 https://medium.com/@team_69582/a-letter-from-the-founders-678e5a3431e7. Not
28 one source of inspiration that Yuga Labs provided to the designer who created the

1 logo was the Nazi *Totenkopf*. *Id.* Indeed, based on the inspirations shared by Yuga
 2 Labs, the designer provided Yuga Labs with different logo options:



15 Yuga Labs selected the image that most looked like a patch, which it felt was
 16 evocative of patches for old yacht clubs. *Id.* Although Ripps falsely claims that the
 17 founders chose the orientation of the skull to match the orientation of the skull in the
 18 Nazi *Totenkopf*, in reality, the angle of the skull was inspired by a photograph of a
 19 real ape skull, which came from a Google image search result for “ape skull.”



1 Ripps has no factual basis for testifying under oath to the contrary. It is
2 fantastical and harassing for the Defendants to continue to knowingly make false
3 statements that are legally irrelevant to this litigation. But that is exactly the purpose
4 of Ripps' declaration. He desires to misuse this case to harass and disparage Yuga
5 Labs' founders.

6 Ripps also knows that an expert on Nazism¹ from the Anti-Defamation League
7 reviewed and considered Ripps' claims of neo-Nazism and rejected them. *See e.g.*,
8 Tompros Decl. Ex. 20, Dkt. 48-23, at 4.² In particular, the expert concluded that there
9 is no apparent connection between BAYC's logo and the Nazi *Totenkopf* image. *Id.*
10 Ripps has been aware of this denouncement of his demonstrably false claims since at
11 least February 2022.

12 The BAYC collection is irreverent, egalitarian, and a little bit weird. Yuga
13 Labs wanted the BAYC collection to capture the vibe of a radical 1969 Warhol
14 Factory party where everyone, from bikers to beatniks to bankers, were invited. The
15 BAYC collection has everything from S&M hats to rainbow suspenders, punk rock
16 jackets to togas, Hawaiian shirts to Cuban guayaberas, devil's horns to halos to
17 cowboy hats, cigars to kazoos to pizza slices, and sunglasses to robot eyes to laser
18 beams. With over 170 mixing and matching traits in the collection, there is an Ape
19 that almost anyone can find themselves in. That also means that what any one Ape
20 looks like is the function of this mixing and matching, not any person's purported
21 racism. The entire concept is eclectic: a bunch of apes hanging out in a yacht club in
22 a swamp, drawing on a bathroom wall. Ripps knows this.

23 Additionally, there are two inspirations for the name of the company, Yuga
24 Labs. The term "yuga" itself means "era" in Sanskrit. Yuga Labs is building a

25
26 ¹ Ripps is not such an expert, and any opinion he might offer is improper. Fed. R.
Evid. 701 and 702.

27 ² Although Yuga Labs objects to this exhibit, along with many others filed by
28 Defendants in support of their motion, Defendants' own evidence debunks their false
claims.

1 company for a new era: Web3. There is also a Zelda videogame character named
2 Yuga that turns things into 2D art, which is similar to Yuga Labs' business. Yuga
3 Labs has publicized these facts too, and Ripps knows them.

4 Ripps offers no factual basis – and cannot offer one – for his false assertion that
5 Yuga Labs engaged in a plot to deceive the public into popularizing Nazi symbolism,
6 alt-right dog whistles, or racist imagery. There is no such factual basis because those
7 claims are false and disproven by evidence that is readily available in the public
8 domain and known to him. Importantly, Federal Rule of Evidence 602 specifically
9 prohibits Ripps from presenting his false speculation as evidence to the Court, which
10 operates on facts and the law.

11 Yuga Labs further objects that the Court may not consider material beyond the
12 pleadings in ruling on a Rule 12(b)(6) motion. *See Hal Roach Studios, Inc. v. Richard*
13 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). “[A] court may consider
14 material which is properly submitted as part of the complaint and matters which may
15 be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the
16 motion to dismiss into a motion for summary judgment.” *Carlsen v. Bank of Am.,*
17 *N.A.*, No. CV 20-1463, 2020 WL 4258657, at *4 (C.D. Cal. June 11, 2020). However,
18 Ripps has not asked the Court to take judicial notice of the purported (false) facts in
19 his declaration. Fed. R. Evid. 201(c) (“The court: (1) may take judicial notice on its
20 own; or (2) must take judicial notice if a party requests it and the court is supplied
21 with the necessary information.”). Nor has Ripps established that the Court *can* take
22 judicial notice of the material he has submitted, which is information and an exhibit
23 that are not part of the Complaint and are not facts which are “accurately and readily
24 determined from sources whose accuracy cannot reasonably be questioned.” *Id.*
25 201(b)(2).

26 Yuga Labs further objects that the Court cannot consider evidence outside of
27 the Complaint on an anti-SLAPP motion analyzed under Rule 12(b)(6). *See Planned*
28 *Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir.),

1 amended, [897 F.3d 1224 \(9th Cir. 2018\)](#) (“[W]e hold that, on the one hand, when an
2 anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district
3 court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider
4 whether a claim is properly stated.”).

5

6 Plaintiff’s objections to the Declaration of Ryder Rипps are hereby
7 _____ SUSTAINED. _____ OVERRULED.

8

9 **B. Objection Number 2**

10 Material Objected To: Paragraph 1: “I am a visual artist and creative director
11 whose multi-disciplinary practice aims to dismantle the porous boundaries between
12 art, the internet, and commerce, agitating the structure of the attention economy and
13 revealing the flow of power in online relationships.”

14 Grounds for Objection: Yuga Labs objects on the same grounds as its
15 objections stated in Objection Number 1 that the Court should not consider evidence
16 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

17 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this
18 Paragraph 1 does not make a fact regarding Defendants’ infringement of the BAYC
19 Marks more or less probable.

20 Yuga Labs further objects pursuant to Federal Rule of Evidence 404 that the
21 fact Rипps regards himself as an artist does not prove or tend to prove that his sale of
22 NFTs using the BAYC Marks is expressive or protected.

23

24 Plaintiff’s objections to Paragraph 1 in the Declaration of Ryder Rипps are
25 hereby

26 _____ SUSTAINED. _____ OVERRULED.

27

28

C. Objection Number 3

Material Objected To: Paragraph 2: “My work often examines popular culture and highlights the effects of technology on society.”

Grounds for Objection: Yuga Labs objects on the same grounds as its objections stated in Objection Number 1 that the Court should not consider evidence outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this Paragraph 2 does not make a fact regarding Defendants' infringement of the BAYC Marks more or less probable.

Yuga Labs further objects pursuant to Federal Rule of Evidence 404 that the fact Rипps regards himself as an artist, or what the purpose of his art “often” is, does not prove or tend to prove that his sale of NFTs using the BAYC Marks is expressive or protected.

Plaintiff's objections to Paragraph 2 in the Declaration of Ryder Rипps are hereby

D. Objection Number 4

Material Objected To: Paragraph 3: “Through my creative content company, OKFocus, I have led creative direction and design projects for companies like Nike and Red Bull, and developed branding for products such as Soylent meat replacements. I have also worked closely with Kanye West in connection with his creative agency *Donda*, and have created art and executed creative direction with many leading musicians such as Grimes, James Blake, MIA, Pop Smoke, Pusha T, Tame Impala, and Travis Scott.”

1 Grounds for Objection: Yuga Labs objects on the same grounds as its
2 objections stated in Objection Number 1 that the Court should not consider evidence
3 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

4 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this
5 Paragraph 3 does not make a fact regarding Defendants' infringement of the BAYC
6 Marks more or less probable.

7 Yuga Labs further objects pursuant to Federal Rule of Evidence 404 that the
8 fact Ripps regards himself as an artist, that any third party might regard him as an
9 artist, or what work he may have developed, does not prove or tend to prove that his
10 sale of NFTs using the BAYC Marks is expressive or protected.

11
12 Plaintiff's objections to Paragraph 3 in the Declaration of Ryder Ripps are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.

16 **E. Objection Number 5**

17 Material Objected To: Paragraph 4: "Beginning at the end of 2021, I started
18 researching Yuga Labs, Inc. ('Yuga') and their use of neo-Nazi symbolism, alt-right
19 dog whistles, and racist imagery in their company and in the Bored Ape Yacht Club
20 ('BAYC') non-fungible tokens ('NFTs')."

21 Grounds for Objection: Yuga Labs objects on the same grounds as its
22 objections stated in Objection Number 1 that the Court should not consider evidence
23 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

24 Yuga Labs objects that this Paragraph 4 lacks foundation to assert any of Ripps'
25 outlandish allegations, including that Yuga Labs uses neo-Nazi symbolism, alt-right
26 dog whistles, or racist imagery, which is a factually false claim as discussed in
27 connection with Objection Number 1.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Paragraph 4 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable. What Ripps did in 2021 is not relevant to the facts
4 alleged in the Complaint and the facts to which Ripps admitted. Specifically, by
5 Ripps' own testimony (in Paragraph 8 of his declaration), he did not begin the
6 RR/BAYC NFTs until May 13, 2022. Ripps admits then that his false claims about
7 Yuga Labs' founders and Defendants' trademark infringement of the BAYC Marks
8 are two separate acts.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
10 probative value of Paragraph 4 is substantially outweighed by the danger of unfair
11 prejudice or confusing the issues. While Yuga Labs condemns Ripps' willfully false
12 statements, Defendants' offensive accusations against Yuga Labs' founders are not
13 the basis for any claim in this lawsuit.

14 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
15 that Ripps is not qualified to offer his factually unsupported and disproven opinions.
16

17 Plaintiff's objections to Paragraph 4 in the Declaration of Ryder Ripps are
18 hereby

19 _____ SUSTAINED. _____ OVERRULED.

21 **F. Objection Number 6**

22 Material Objected To: Paragraph 5: "I began posting on social media, Twitter
23 and Instagram, going on podcasts, and speaking to investigative journalists to expose
24 the misconduct I had found and to start a public discussion of Yuga's offensive
25 material. Additionally, in January 2022, I created the website
26 <https://gordongoner.com> to compile the information I found for the public to view
27 and discuss."

1 Grounds for Objection: Yuga Labs objects on the same grounds as its
2 objections stated in Objection Number 1 that the Court should not consider evidence
3 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

4 Yuga Labs objects that Ripps lacks foundation to assert any of his false and
5 outlandish allegations, including that Yuga Labs' material is "offensive" and that any
6 "misconduct" occurred, which is a factually false claim as discussed in connection
7 with Objection Number 1.

8 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
9 Paragraph 5 does not make a fact regarding Defendants' infringement of the BAYC
10 Marks more or less probable. What Ripps did in 2021 and early 2022 is not relevant
11 to the facts alleged in the Complaint and the facts to which Ripps admitted.
12 Specifically, by Ripps' own testimony (in Paragraph 8 of his declaration), he did not
13 begin the RR/BAYC NFTs until May 13, 2022. Ripps admits then that his false
14 claims about Yuga Labs' founders and Defendants' trademark infringement of the
15 BAYC Marks are two separate acts.

16 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
17 probative value of Paragraph 5 is substantially outweighed by the danger of unfair
18 prejudice or confusing the issues. This case focuses on trademark infringement and
19 false advertising by Defendants. While Yuga Labs condemns Ripps' willfully false
20 statements, Defendants' offensive accusations against Yuga Labs' founders are not
21 the basis for any claim in this lawsuit.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
23 that Ripps is not qualified to offer his factually unsupported and disproven opinions
24 that Yuga Labs' material is "offensive" or that any "misconduct" occurred.

25
26 Plaintiff's objections to Paragraph 5 in the Declaration of Ryder Ripps are
27 hereby

28 ____ SUSTAINED. ____ OVERRULED.

1 **G. Objection Number 7**

2 Material Objected To: Paragraph 6: “I also spoke against the number of
3 celebrities that promoted BAYC NFTs. It is my understanding that Yuga used the
4 following celebrities to promote the BAYC collection and their neo-Nazi
5 symbolism”

6 Grounds for Objection: Yuga Labs objects on the same grounds as its
7 objections stated in Objection Number 1 that the Court should not consider evidence
8 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

9 Yuga Labs objects that Ripps lacks foundation to assert any of his false and
10 outlandish allegations, including that Yuga Labs uses neo-Nazi symbolism, which is
11 a factually false claim as discussed in connection with Objection Number 1.
12 Furthermore, Ripps has no factual basis for testifying that “Yuga used the following
13 celebrities to promote the BAYC collection *and their neo-Nazi symbolism*” (emphasis
14 added) because that statement is false. Even if his statement were not false (which it
15 is), Ripps is not a founder of Yuga Labs or in any way connected with the company
16 and thus could not have any personal knowledge of Yuga Labs’ internal marketing
17 plans.

18 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
19 Paragraph 6 does not make a fact regarding Defendants’ infringement of the BAYC
20 Marks more or less probable. What Ripps did in 2021 and early 2022 is not relevant
21 to the facts alleged in the Complaint and the facts as admitted to by Ripps.
22 Specifically, by Ripps’ own testimony (in Paragraph 8 of his declaration), he did not
23 begin the RR/BAYC NFTs until May 13, 2022. Ripps admits then that his false
24 claims about Yuga Labs’ founders and Defendants’ trademark infringement of the
25 BAYC Marks are two separate acts.

26 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
27 probative value of Paragraph 6 is substantially outweighed by the danger of unfair
28 prejudice or confusing the issues. While Yuga Labs condemns Ripps’ willfully false

1 statements, Defendants' offensive accusations against Yuga Labs' founders are not
2 the basis for any claim in this lawsuit.

3 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
4 that Ripps is not qualified to offer his factually unsupported and disproven opinion
5 that Yuga Labs uses neo-Nazi symbolism.

6
7 Plaintiff's objections to Paragraph 6 in the Declaration of Ryder Ripps are
8 hereby

9 _____ SUSTAINED. _____ OVERRULED.
10

11 **H. Objection Number 8**

12 Material Objected To: Paragraph 7: "In December 2021, Guy Oseary, Yuga's
13 talent manager, called me to discuss the public statements I had made about Yuga's
14 neo-Nazi symbolism. On the call, Oseary made a series of vague threats, saying 'I
15 can be a nice guy or I can be a not nice guy' and that I would be better off being
16 friends with Yuga. Oseary suggested that he understood Yuga used racist dog
17 whistles by stating 'who am I to judge someone's art.' Oseary stated that he would
18 help me if I kept silent and that he could make my life difficult if I did not cooperate.
19 Oseary also offered to introduce me to Kanye West, not realizing that I already
20 worked with him, and later added me to a text message thread with West's manager.
21 When I had not posted anything new criticizing Yuga for about one week and
22 unpinned a Tweet criticizing Yuga, Oseary left me a voice memo thanking me for
23 my silence."

24 Grounds for Objection: Yuga Labs objects on the same grounds as its
25 objections stated in Objection Number 1 that the Court should not consider evidence
26 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

27 Yuga Labs objects that Ripps lacks foundation to assert any of his false and
28 outlandish allegations, including that Yuga Labs uses neo-Nazi symbolism, which is

1 a factually false claim as discussed in connection with Objection Number 1.

2 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
3 Paragraph 7 does not make a fact regarding Defendants' infringement of the BAYC
4 Marks more or less probable. This call that Ripps allegedly had in 2021 is not relevant
5 to the facts alleged in the Complaint and the facts as admitted to by Ripps.
6 Specifically, by Ripps' own testimony (in Paragraph 8 of his declaration), he did not
7 begin the RR/BAYC NFTs until May 13, 2022. Ripps admits then that his false claims
8 about Yuga Labs' founders and Defendants' trademark infringement of the BAYC
9 Marks are two separate acts.

10 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
11 probative value of Paragraph 7 is substantially outweighed by the danger of unfair
12 prejudice or confusing the issues. While Yuga Labs condemns Ripps' willfully false
13 statements, Defendants' offensive accusations against Yuga Labs' founders are not
14 the basis for any claim in this lawsuit.

15 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
16 that Ripps is not qualified to offer his factually unsupported and disproven opinion
17 that Yuga Labs uses neo-Nazi symbolism.

18
19 Plaintiff's objections to Paragraph 7 in the Declaration of Ryder Ripps are
20 hereby

21 _____ SUSTAINED. _____ OVERRULED.

22
23 **I. Objection Number 9**

24 Material Objected To: Paragraph 8: "On May 13, 2022, I began creating the
25 artistic project, RR/BAYC. The project has grown to include a collection of NFTs,
26 each of which uses a unique blockchain entry but includes a link to the same digital
27 image as the corresponding BAYC NFT. The purpose of the project was to (1) bring
28 attention to Yuga's use of racist messages and imagery, (2) expose Yuga's use of

1 celebrities and popular brands to disseminate offensive material, (3) create social
2 pressure demanding that Yuga take responsibility for its actions, and (4) educate the
3 public about the nature of NFTs.”

4 Grounds for Objection: Yuga Labs objects on the same grounds as its
5 objections stated in Objection Number 1 that the Court should not consider evidence
6 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

7 Yuga Labs objects that Ripps lacks foundation to assert (falsely) that
8 Defendants’ “project” is artistic. For instance, in August 2022 Cahen told an audience
9 that “NFTs are not art.” Yuga Labs objects that this Paragraph 8 lacks foundation to
10 assert (falsely) that Yuga Labs used “racist messages and images”, used celebrities
11 and popular brands to “disseminate offensive material”, that there is “offensive
12 material” contained within Yuga Labs’ work, and that Yuga Labs has taken any such
13 falsely alleged actions.

14 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
15 that this is improper opinion testimony that Defendants’ RR/BAYC NFTs are artistic.
16

17 Plaintiff’s objections to Paragraph 8 in the Declaration of Ryder Ripps are
18 hereby

19 _____ SUSTAINED. _____ OVERRULED.

21 **J. Objection Number 10**

22 Material Objected To: Paragraph 15 and Exhibit 1 (Dkt. 48-2): “Attached
23 hereto as Exhibit 1, is a list of various NFT projects that use the BAYC NFT images
24 to make a profit off of the BAYC NFT brand without expressing any artistic or critical
25 commentary regarding Yuga. To the best of my knowledge, Yuga has not
26 commenced litigation against any of them.”

27 Grounds for Objection: Yuga Labs objects on the same grounds as its
28 objections stated in Objection Number 1 that the Court should not consider evidence

1 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

2 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this
3 Paragraph 15 and Exhibit 1 do not make a fact regarding Defendants' infringement
4 of the BAYC Marks more or less probable. Whether other potential infringers exist
5 is immaterial to Defendants' infringement of Yuga Labs' trademarks. That someone
6 else may infringe Yuga Labs' trademarks is not a defense for Defendants' own
7 infringement.

8 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that this
9 Paragraph 15 and Exhibit 1 are misleading, incomplete, and a waste of time.

10 Yuga Labs further objects that Ripps' offensive speculation is not permitted in
11 this Court, which operates on facts and the law. Fed. R. Evid. 602. Ripps does not
12 declare how this list, in Exhibit 1, was created or offer any factual basis for his
13 statement that Yuga Labs has not commenced litigation against any of them. His
14 declaration lacks any indicia of personal knowledge from which he could offer this
15 testimony.

16 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
17 that this Paragraph 15 and Exhibit 1 are improper opinion testimony about what is and
18 is not "artistic" or "critical" commentary. Although Ripps admits that these knockoff
19 BAYC NFTs are neither "artistic" nor "critical" of Yuga Labs (and, thus by extension
20 admits that Defendants' own identical knockoff NFTs, the subject of this lawsuit, are
21 also neither artistic nor critical), Ripps may not testify to his opinion about whether
22 these other NFTs are artistic or expressive, or not.

23 Yuga Labs further objects pursuant to Federal Rule of Evidence 901 that
24 Exhibit 1 is an unauthenticated data compilation.

25
26 Plaintiff's objections to Paragraph 15, including Exhibit 1, in the Declaration
27 of Ryder Ripps are hereby

28 _____ SUSTAINED. _____ OVERRULED.

1 **II. The Declaration of Louis Tompros**

2 **A. Objection Number 11**

3 Material Objected To: The entirety of the Declaration of Louis Tompros. Dkt.
4 48-3.

5 Grounds for Objection: Yuga Labs objects that generally the Court may not
6 consider material beyond the pleadings in ruling on a Rule 12(b)(6) motion. *See*
7 *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.
8 1990). “[A] court may consider material which is properly submitted as part of the
9 complaint and matters which may be judicially noticed pursuant to Federal Rule of
10 Evidence 201 without converting the motion to dismiss into a motion for summary
11 judgment.” *Carlsen v. Bank of Am., N.A.*, No. CV 20-1463, 2020 WL 4258657, at *4
12 (C.D. Cal. June 11, 2020). Defendants have not asked the Court to take judicial notice
13 of the exhibits attached to Mr. Tompros’ declaration. Fed. R. Evid. 201(c) (“The
14 court: (1) may take judicial notice on its own; or (2) must take judicial notice if a
15 party requests it and the court is supplied with the necessary information.”). Nor have
16 they established that the Court *can* take judicial notice of the material Mr. Tompros
17 has submitted, which are exhibits that are not part of the Complaint and are not facts
18 which are “accurately and readily determined from sources whose accuracy cannot
19 reasonably be questioned.” *Id.* 201(b)(2). The Ninth Circuit has made clear that “[a]
20 court must also consider – and identify – which fact or facts it is noticing from . . . [a
21 document]. Just because the document itself is susceptible to judicial notice does not
22 mean that every assertion of fact within that document is judicially noticeable for its
23 truth.” *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 999 (9th Cir. 2018). This is
24 because the substance “is subject to varying interpretations, and there is a reasonable
25 dispute as to what the [document] establishes.” *Id.* at 1000. Defendants have not even
26 attempted to establish that the Court can or should consider any of the exhibits
27 attached to the declaration of Mr. Tompros in ruling on Defendants’ MTS.

1 Yuga Labs further objects that the Court cannot consider evidence outside of
2 the Complaint on an anti-SLAPP motion analyzed pursuant to Rule 12(b)(6). Cf.
3 *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1156 (9th Cir. 2021) (“The
4 defendant determines which motions she files, not the plaintiff. Given that the parties
5 do not dispute that Maddow’s motion challenged the legal sufficiency of Herring’s
6 complaint, we conclude that Herring’s reliance on evidence outside of its complaint
7 in defending against the motion was improper and inconsistent with the Federal
8 Rules.”); see also *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*,
9 890 F.3d 828, 834 (9th Cir.), amended, 897 F.3d 1224 (9th Cir. 2018) (“[W]e hold
10 that, on the one hand, when an anti-SLAPP motion to strike challenges only the legal
11 sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure
12 12(b)(6) standard and consider whether a claim is properly stated.”).

13 Yuga Labs further objects that the exhibits to Mr. Tompros’ declaration are not
14 authenticated. Fed. R. Evid. 901. Mr. Tompros does not declare when any exhibit
15 was created and, for all except Exhibits 1, 2, and 35, does not declare from where the
16 exhibit was obtained.

17 Yuga Labs further objects that Mr. Tompros’ declaration seeks to introduce
18 irrelevant and prejudicial material. Fed. R. Evid. 401, 403.

19 Yuga Labs further objects that Defendants offer the declaration of
20 Mr. Tompros for the improper purposes of harassing Yuga Labs and needlessly
21 increasing the cost of litigation.

22
23 Plaintiff’s objections to the Declaration of Louis Tompros are hereby
24 _____ SUSTAINED. _____ OVERRULED.

25
26 **B. Objection Number 12**

27 Material Objected To: Exhibit 2 (Dkt. 48-5) to the Declaration of Louis
28 Tompros.

1 Grounds for Objection: Yuga Labs objects on the same grounds as its
2 objections stated in Objection Number 11 that the Court should not consider evidence
3 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

4 Yuga Labs objects that this website is not properly the subject of judicial notice
5 and Defendants' have not sought judicial notice of this Exhibit 2. Fed. R. Evid. 201.
6 "[T]he mere mention of the existence of a document is insufficient to incorporate the
7 contents" of a document. *Khoja, 899 F.3d at 1002* (citation omitted). Yuga Labs
8 further objects that Defendants offer Exhibit 2 for the improper purposes of harassing
9 Yuga Labs and needlessly increasing the cost of litigation.

10 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
11 Exhibit 2 does not make a fact regarding Defendants' infringement of the BAYC
12 Marks more or less probable. While Ripps' statements on this website are false and
13 offensive, they are not at issue in this lawsuit. Instead, Defendants' infringing actions
14 are at issue.

15 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
16 probative value of Exhibit 2 is substantially outweighed by the danger of unfair
17 prejudice or confusing the issues. While Yuga Labs condemns Ripps' willfully false
18 statements on this website, Defendants' offensive accusations against Yuga Labs'
19 founders are not the basis for any claim in this lawsuit.

20 Yuga Labs further objects that Exhibit 2 is not authenticated. Fed. R.
21 Evid. 901.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
23 improper hearsay.

24
25 Plaintiff's objections to Exhibit 2 to the Declaration of Louis Tompros are
26 hereby

27 _____ SUSTAINED. _____ OVERRULED.
28

1 **C. Objection Number 13**

2 Material Objected To: Exhibit 3 (Dkt. 48-6) to the Declaration of Louis
3 Tompros.

4 Grounds for Objection: Yuga Labs objects on the same grounds as its
5 objections stated in Objection Number 11 that the Court should not consider evidence
6 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

7 Yuga Labs objects that this webpage is not properly the subject of judicial
8 notice and Defendants have not sought judicial notice of this Exhibit 3. Fed. R.
9 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 3 for the improper
10 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

11 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
12 Exhibit 3 does not make a fact regarding Defendants' infringement of the BAYC
13 Marks more or less probable.

14 Yuga Labs further objects that Exhibit 3 is not authenticated. Fed. R.
15 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 3, and
16 although Exhibit 3 contains information which might answer those concerns
17 Mr. Tompros does not establish those facts and the document is not self-
18 authenticating.

19 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
20 improper hearsay.

21
22 Plaintiff's objections to Exhibit 3 to the Declaration of Louis Tompros are
23 hereby

24 ____ SUSTAINED. ____ OVERRULED.

25
26 **D. Objection Number 14**

27 Material Objected To: Exhibit 4 (Dkt. 48-7) to the Declaration of Louis
28 Tompros.

1 Grounds for Objection: Yuga Labs objects on the same grounds as its
2 objections stated in Objection Number 11 that the Court should not consider evidence
3 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

4 Yuga Labs objects that this webpage is not properly the subject of judicial
5 notice and Defendants have not sought judicial notice of this Exhibit 4. Fed. R.
6 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 4 for the improper
7 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

8 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
9 Exhibit 4 does not make a fact regarding Defendants' infringement of the BAYC
10 Marks more or less probable.

11 Yuga Labs further objects that Exhibit 4 is not authenticated. Fed. R.
12 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 4.

13 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
14 improper hearsay.

15
16 Plaintiff's objections to Exhibit 4 to the Declaration of Louis Tompros are
17 hereby

18 _____ SUSTAINED. _____ OVERRULED.
19

20 **E. Objection Number 15**

21 Material Objected To: Exhibit 5 (Dkt. 48-8) to the Declaration of Louis
22 Tompros.

23 Grounds for Objection: Yuga Labs objects on the same grounds as its
24 objections stated in Objection Number 11 that the Court should not consider evidence
25 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

26 Yuga Labs objects that this webpage is not properly the subject of judicial
27 notice and Defendants have not sought judicial notice of this Exhibit 5. Fed. R.
28 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 5 for the improper

1 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

2 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
3 Exhibit 5 does not make a fact regarding Defendants' infringement of the BAYC
4 Marks more or less probable.

5 Yuga Labs further objects that Exhibit 5 is not authenticated. Fed. R. Evid. 901.
6 Mr. Tompros does not declare where or when he acquired Exhibit 5, and although
7 Exhibit 5 contains information which might answer those concerns Mr. Tompros does
8 not establish those facts and the document is not self-authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 5 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **F. Objection Number 16**

17 Material Objected To: Exhibit 6 (Dkt. 48-9) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this webpage is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 6. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 6 for the improper
25 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

26 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
27 Exhibit 6 does not make a fact regarding Defendants' infringement of the BAYC
28 Marks more or less probable.

1 Yuga Labs further objects that Exhibit 6 is not authenticated. Fed. R.
2 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 6, and
3 although Exhibit 6 contains information which might answer those concerns
4 Mr. Tompros does not establish those facts and the document is not self-
5 authenticating.

6 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
7 improper hearsay.

9 Plaintiff's objections to Exhibit 6 to the Declaration of Louis Tompros are
10 hereby

11 _____ SUSTAINED. _____ OVERRULED.

12

13 **G. Objection Number 17**

14 Material Objected To: Exhibit 7 (Dkt. 48-10) to the Declaration of Louis
15 Tompros.

16 Grounds for Objection: Yuga Labs objects on the same grounds as its
17 objections stated in Objection Number 11 that the Court should not consider evidence
18 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

19 Yuga Labs objects that this webpage is not properly the subject of judicial
20 notice and Defendants have not sought judicial notice of this Exhibit 7. Fed. R.
21 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 7 for the improper
22 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

23 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
24 Exhibit 7 does not make a fact regarding Defendants' infringement of the BAYC
25 Marks more or less probable.

26 Yuga Labs further objects that Exhibit 7 is not authenticated. Fed. R.
27 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 7.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
2 improper hearsay.

4 Plaintiff's objections to Exhibit 7 to the Declaration of Louis Tompros are
5 hereby

6 _____ SUSTAINED. _____ OVERRULED.

8 **H. Objection Number 18**

9 Material Objected To: Exhibit 8 (Dkt. 48-11) to the Declaration of Louis
10 Tompros.

11 Grounds for Objection: Yuga Labs objects on the same grounds as its
12 objections stated in Objection Number 11 that the Court should not consider evidence
13 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

14 Yuga Labs objects that this webpage is not properly the subject of judicial
15 notice and Defendants have not sought judicial notice of this Exhibit 8. Fed. R.
16 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 8 for the improper
17 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

18 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
19 Exhibit 8 does not make a fact regarding Defendants' infringement of the BAYC
20 Marks more or less probable.

21 Yuga Labs further objects that Exhibit 8 is not authenticated. Fed. R.
22 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 8, and
23 although Exhibit 8 contains information which might answer those concerns
24 Mr. Tompros does not establish those facts and the document is not self-
25 authenticating.

26 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
27 improper hearsay.

1 Plaintiff's objections to Exhibit 8 to the Declaration of Louis Tompros are
2 hereby

3 _____ SUSTAINED. _____ OVERRULED.
4

5 **I. Objection Number 19**

6 Material Objected To: Exhibit 9 (Dkt. 48-12) to the Declaration of Louis
7 Tompros.

8 Grounds for Objection: Yuga Labs objects on the same grounds as its
9 objections stated in Objection Number 11 that the Court should not consider evidence
10 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

11 Yuga Labs objects that this webpage is not properly the subject of judicial
12 notice and Defendants have not sought judicial notice of this Exhibit 9. Fed. R.
13 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 9 for the improper
14 purposes of harassing Yuga Labs and needlessly increasing the cost of litigation.

15 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
16 Exhibit 9 does not make a fact regarding Defendants' infringement of the BAYC
17 Marks more or less probable.

18 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
19 probative value of Exhibit 9 is substantially outweighed by the danger of unfair
20 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
21 that Yuga Labs' founders are white supremacists and yet Defendants seek to introduce
22 Exhibit 9 to make that unfounded (and false) accusation. Moreover, the document
23 itself indicates that "18" has been associated with a British white supremacist group
24 but only "occasionally" appears in cells in the U.S. that "tend to be small and short-
25 lived"; there is no evidence that any Yuga Labs founder has any relationship to any
26 "Combat 18" cell because none do.

27 Yuga Labs further objects that Exhibit 9 is not authenticated. Fed. R.
28 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 9, and

1 although Exhibit 9 contains information which might answer those concerns
2 Mr. Tompros does not establish those facts and the document is not self-
3 authenticating.

4 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
5 improper hearsay.

6
7 Plaintiff's objections to Exhibit 9 to the Declaration of Louis Tompros are
8 hereby

9 _____ SUSTAINED. _____ OVERRULED.
10

11 **J. Objection Number 20**

12 Material Objected To: Exhibit 10 (Dkt. 48-13) to the Declaration of Louis
13 Tompros.

14 Grounds for Objection: Yuga Labs objects on the same grounds as its
15 objections stated in Objection Number 11 that the Court should not consider evidence
16 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

17 Yuga Labs objects that this Exhibit 10 is not properly the subject of judicial
18 notice and Defendants have not sought judicial notice of this Exhibit 10. Fed. R.
19 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 10 for the
20 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
21 litigation.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
23 Exhibit 10 does not make a fact regarding Defendants' infringement of the BAYC
24 Marks more or less probable.

25 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
26 probative value of Exhibit 10 is substantially outweighed by the danger of unfair
27 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
28

1 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
2 to introduce Exhibit 10 to make that unfounded (and false) accusation.

3 Yuga Labs further objects that Exhibit 10 is not authenticated. Fed. R.
4 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 10, and
5 although Exhibit 10 contains information which might answer those concerns
6 Mr. Tompros does not establish those facts and the document is not self-
7 authenticating. Even more, information in Exhibit 10 suggests that Mr. Tompros did
8 not personally acquire Exhibit 10, further obscuring the source of Exhibit 10.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
12 as improper opinion testimony.

13 Plaintiff's objections to Exhibit 10 to the Declaration of Louis Tompros are
14 hereby

15 _____ SUSTAINED. _____ OVERRULED.

16
17
18 **K. Objection Number 21**

19 Material Objected To: Exhibit 11 (Dkt. 48-14) to the Declaration of Louis
20 Tompros.

21 Grounds for Objection: Yuga Labs objects on the same grounds as its
22 objections stated in Objection Number 11 that the Court should not consider evidence
23 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

24 Yuga Labs objects that this webpage is not properly the subject of judicial
25 notice and Defendants have not sought judicial notice of this Exhibit 11. Fed. R.
26 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 11 for the
27 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
28 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 11 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
5 probative value of Exhibit 11 is substantially outweighed by the danger of unfair
6 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
7 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
8 to introduce Exhibit 11 to make that unfounded (and false) accusation.

9 Yuga Labs further objects that Exhibit 11 is not authenticated. Fed. R.
10 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 11, and
11 although Exhibit 11 contains information which might answer those concerns,
12 Mr. Tompros does not establish those facts and the document is not self-
13 authenticating.

14 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
15 improper hearsay.

16 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
17 as improper opinion testimony

18
19 Plaintiff's objections to Exhibit 11 to the Declaration of Louis Tompros are
20 hereby

21 _____ SUSTAINED. _____ OVERRULED.

22
23 **L. Objection Number 22**

24 Material Objected To: Exhibit 12 (Dkt. 48-15) to the Declaration of Louis
25 Tompros.

26 Grounds for Objection: Yuga Labs objects on the same grounds as its
27 objections stated in Objection Number 11 that the Court should not consider evidence
28 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

1 Yuga Labs objects that this webpage is not properly the subject of judicial
2 notice and Defendants have not sought judicial notice of this Exhibit 12. Fed. R.
3 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 12 for the
4 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
5 litigation.

6 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this Exhibit
7 12 does not make a fact regarding Defendants' infringement of the BAYC Marks
8 more or less probable.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
10 probative value of Exhibit 12 is substantially outweighed by the danger of unfair
11 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
12 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
13 to introduce Exhibit 12 to make that unfounded (and false) accusation.

14 Yuga Labs further objects that Exhibit 12 is not authenticated. Fed. R.
15 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 12, and
16 although Exhibit 12 contains information which might answer those concerns,
17 Mr. Tompros does not establish those facts and the document is not self-
18 authenticating.

19 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
20 improper hearsay.

21 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
22 as improper opinion testimony.

23
24 Plaintiff's objections to Exhibit 12 to the Declaration of Louis Tompros are
25 hereby

26 _____ SUSTAINED. _____ OVERRULED.
27
28

1 **M. Objection Number 23**

2 Material Objected To: Exhibit 13 (Dkt. 48-16) to the Declaration of Louis
3 Tompros.

4 Grounds for Objection: Yuga Labs objects on the same grounds as its
5 objections stated in Objection Number 11 that the Court should not consider evidence
6 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

7 Yuga Labs objects that this third-party social media post is not properly the
8 subject of judicial notice and Defendants have not sought judicial notice of this
9 Exhibit 13. Fed. R. Evid. 201. Yuga Labs further objects that Defendants offer
10 Exhibit 13 for the improper purposes of harassing Yuga Labs and needlessly
11 increasing the cost of litigation.

12 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
13 Exhibit 13 does not make a fact regarding Defendants' infringement of the BAYC
14 Marks more or less probable.

15 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
16 probative value of Exhibit 13 is substantially outweighed by the danger of unfair
17 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
18 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
19 to introduce Exhibit 13 to make that unfounded (and false) accusation.

20 Yuga Labs further objects that Exhibit 13 is not authenticated. Fed. R.
21 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 13, and
22 although Exhibit 13 contains information which might answer those concerns,
23 Mr. Tompros does not establish those facts and the document is not self-
24 authenticating. Moreover, Mr. Tompros has not authenticated, and likely cannot, that
25 any Tweet was made by any specific person.

26 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
27 improper hearsay.

1 Plaintiff's objections to Exhibit 13 to the Declaration of Louis Tompros are
2 hereby

3 _____ SUSTAINED. _____ OVERRULED.
4

5 **N. Objection Number 24**

6 Material Objected To: Exhibit 14 (Dkt. 48-17) to the Declaration of Louis
7 Tompros.

8 Grounds for Objection: Yuga Labs objects on the same grounds as its
9 objections stated in Objection Number 11 that the Court should not consider evidence
10 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

11 Yuga Labs objects that this third-party social media post is not properly the
12 subject of judicial notice and Defendants have not sought judicial notice of this
13 Exhibit 14. Fed. R. Evid. 201. Yuga Labs further objects that Defendants offer
14 Exhibit 14 for the improper purposes of harassing Yuga Labs and needlessly
15 increasing the cost of litigation.

16 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
17 Exhibit 14 does not make a fact regarding Defendants' infringement of the BAYC
18 Marks more or less probable.

19 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
20 probative value of Exhibit 14 is substantially outweighed by the danger of unfair
21 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
22 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
23 to introduce Exhibit 14 to make that unfounded (and false) accusation.

24 Yuga Labs further objects that Exhibit 14 is not authenticated. Fed. R.
25 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 14, and
26 although Exhibit 14 contains information which might answer those concerns,
27 Mr. Tompros does not establish those facts and the document is not self-

1 authenticating. Moreover, Mr. Tompros has not authenticated, and likely cannot, that
2 any Tweet was made by any specific person.

3 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
4 improper hearsay.

5 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
6 as improper opinion testimony.

8 Plaintiff's objections to Exhibit 14 to the Declaration of Louis Tompros are
9 hereby

10 SUSTAINED. OVERRULLED.

O. Objection Number 25

13 Material Objected To: Exhibit 15 (Dkt. 48-18) to the Declaration of Louis
14 Tompros.

15 Grounds for Objection: Yuga Labs objects on the same grounds as its
16 objections stated in Objection Number 11 that the Court should not consider evidence
17 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

18 Yuga Labs objects that this private communication between two third parties
19 is not properly the subject of judicial notice and Defendants have not sought judicial
20 notice of this Exhibit 15. Fed. R. Evid. 201. Yuga Labs further objects that
21 Defendants offer Exhibit 15 for the improper purposes of harassing Yuga Labs and
22 needlessly increasing the cost of litigation.

23 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
24 Exhibit 15 does not make a fact regarding Defendants' infringement of the BAYC
25 Marks more or less probable.

26 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
27 probative value of Exhibit 15 is substantially outweighed by the danger of unfair
28 prejudice or confusing the issues. Exhibit 15 reflects a private conversation between

1 two non-parties relating to their personal beliefs about Yuga Labs and where one party
2 admits that he does not feel like he knows “what’s going on” but is nevertheless
3 willing to participate in a public dialogue about Yuga Labs at the behest of another
4 party. Defendants also lack any foundation to assert (falsely) that Yuga Labs’
5 founders are associated with the “alt-right” and yet Defendants seek to introduce
6 Exhibit 15 to make that unfounded (and false) accusation.

7 Yuga Labs further objects that Exhibit 15 is not authenticated and there is no
8 possible way that Mr. Tompros could authenticate Exhibit 15 unless he was one of
9 the two parties participating in the private communication. Fed. R. Evid. 901.
10 Mr. Tompros cannot even authenticate that any communication was made by any
11 specific person. Mr. Tompros certainly does not lay any foundation as to how he
12 could even attempt to declare under oath that Exhibit 15 is a “true and correct copy
13 of two images showing direct messages between Richard Spencer and Frederick
14 Brennan.”

15 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
16 improper hearsay.

17 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
18 as improper opinion testimony.

19
20 Plaintiff’s objections to Exhibit 15 to the Declaration of Louis Tompros are
21 hereby

22 _____ SUSTAINED. _____ OVERRULED.
23

24 **P. Objection Number 26**

25 Material Objected To: Exhibit 16 (Dkt. 48-19) to the Declaration of Louis
26 Tompros.

27 Grounds for Objection: Yuga Labs objects on the same grounds as its
28 objections stated in Objection Number 11 that the Court should not consider evidence

1 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

2 Yuga Labs objects that this webpage is not properly the subject of judicial
3 notice and Defendants have not sought judicial notice of this Exhibit 16. Fed. R.
4 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 16 for the
5 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
6 litigation.

7 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
8 Exhibit 16 does not make a fact regarding Defendants' infringement of the BAYC
9 Marks more or less probable.

10 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
11 probative value of Exhibit 16 is substantially outweighed by the danger of unfair
12 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
13 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
14 to introduce Exhibit 16 to make that unfounded (and false) accusation. The unknown
15 author of Exhibit 16 similarly lacks foundation to make those unfounded (and false)
16 accusations.

17 Yuga Labs further objects that Exhibit 16 is not authenticated. Fed. R.
18 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 16, and
19 although Exhibit 16 contains information which might answer those concerns,
20 Mr. Tompros does not establish those facts and the document is not self-
21 authenticating.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
23 improper hearsay.

24 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
25 as improper opinion testimony.

26
27
28

1 Plaintiff's objections to Exhibit 16 to the Declaration of Louis Tompros are
2 hereby

3 _____ SUSTAINED. _____ OVERRULED.
4

5 **Q. Objection Number 27**

6 Material Objected To: Exhibit 17 (Dkt. 48-20) to the Declaration of Louis
7 Tompros.

8 Grounds for Objection: Yuga Labs objects on the same grounds as its
9 objections stated in Objection Number 11 that the Court should not consider evidence
10 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

11 Yuga Labs objects that this webpage is not properly the subject of judicial
12 notice and Defendants have not sought judicial notice of this Exhibit 17. Fed. R.
13 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 17 for the
14 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
15 litigation.

16 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
17 Exhibit 17 does not make a fact regarding Defendants' infringement of the BAYC
18 Marks more or less probable.

19 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
20 probative value of Exhibit 17 is substantially outweighed by the danger of unfair
21 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
22 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
23 to introduce Exhibit 17 to make that unfounded (and false) accusation.

24 Yuga Labs further objects that Exhibit 17 is not authenticated. Fed. R.
25 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 17, and
26 although Exhibit 17 contains information which might answer those concerns,
27 Mr. Tompros does not establish those facts and the document is not
28 self-authenticating.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
2 improper hearsay.

3
4 Plaintiff's objections to Exhibit 17 to the Declaration of Louis Tompros are
5 hereby

6 _____ SUSTAINED. _____ OVERRULED.
7

8 **R. Objection Number 28**

9 Material Objected To: Exhibit 18 (Dkt. 48-21) to the Declaration of Louis
10 Tompros.

11 Grounds for Objection: Yuga Labs objects on the same grounds as its
12 objections stated in Objection Number 11 that the Court should not consider evidence
13 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

14 Yuga Labs objects that this webpage is not properly the subject of judicial
15 notice and Defendants have not sought judicial notice of this Exhibit 18. Fed. R.
16 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 18 for the
17 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
18 litigation.

19 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
20 Exhibit 18 does not make a fact regarding Defendants' infringement of the BAYC
21 Marks more or less probable.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
23 probative value of Exhibit 18 is substantially outweighed by the danger of unfair
24 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
25 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
26 to introduce Exhibit 18 to make that unfounded (and false) accusation.

27 Yuga Labs further objects that Exhibit 18 is not authenticated. Fed. R.
28 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 18, and

1 although Exhibit 18 contains information which might answer those concerns,
2 Mr. Tompros does not establish those facts and the document is not self-
3 authenticating.

4 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
5 improper hearsay.

6
7 Plaintiff's objections to Exhibit 18 to the Declaration of Louis Tompros are
8 hereby

9 _____ SUSTAINED. _____ OVERRULED.
10

11 **S. Objection Number 29**

12 Material Objected To: Exhibit 19 (Dkt. 48-22) to the Declaration of Louis
13 Tompros.

14 Grounds for Objection: Yuga Labs objects on the same grounds as its
15 objections stated in Objection Number 11 that the Court should not consider evidence
16 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

17 Yuga Labs objects that this Exhibit 19 comprised of a compilation of social
18 media posts by unnamed third parties is not properly the subject of judicial notice and
19 Defendants have not sought judicial notice of this Exhibit 19. Fed. R. Evid. 201.
20 Yuga Labs further objects that Defendants offer Exhibit 19 for the improper purposes
21 of harassing Yuga Labs and needlessly increasing the cost of litigation.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
23 Exhibit 19 does not make a fact regarding Defendants' infringement of the BAYC
24 Marks more or less probable.

25 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
26 probative value of Exhibit 19 is substantially outweighed by the danger of unfair
27 prejudice or confusing the issues. While Yuga Labs condemns these third parties'
28 willfully false statements, Defendants' and third parties' offensive accusations against

1 Yuga Labs' founders are not the basis for any claim in this lawsuit. Defendants lack
2 any foundation to assert (falsely) that Yuga Labs' founders are associated with the
3 "alt-right" and yet Defendants seek to introduce Exhibit 19 to make that unfounded
4 (and false) accusation.

5 Yuga Labs further objects that Exhibit 19 is not authenticated. Fed. R.
6 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 19, and
7 although Exhibit 19 contains information which might answer those concerns,
8 Mr. Tompros does not establish those facts and the document is not
9 self-authenticating.

10 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
11 improper hearsay.

12 Yuga Labs further objects pursuant to Federal Rule of Evidence 701 and 702
13 as improper opinion testimony.

14
15 Plaintiff's objections to Exhibit 19 to the Declaration of Louis Tompros are
16 hereby

17 _____ SUSTAINED. _____ OVERRULED.

18
19 **T. Objection Number 30**

20 Material Objected To: Exhibit 20 (Dkt. 48-23) to the Declaration of Louis
21 Tompros.

22 Grounds for Objection: Yuga Labs objects that this article is not properly the
23 subject of judicial notice and Defendants have not sought judicial notice of this
24 Exhibit 20. Fed. R. Evid. 201. Yuga Labs further objects that Defendants offer
25 Exhibit 20 for the improper purposes of harassing Yuga Labs and needlessly
26 increasing the cost of litigation.

1 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this Exhibit
2 20 does not make a fact regarding Defendants' infringement of the BAYC Marks
3 more or less probable.

4 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
5 probative value of Exhibit 20 is substantially outweighed by the danger of unfair
6 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
7 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
8 to introduce Exhibit 20 to make that unfounded (and false) accusation.

9 Yuga Labs further objects that Exhibit 20 is not authenticated. Fed. R.
10 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 20.

11 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
12 improper hearsay.

13
14 Plaintiff's objections to Exhibit 20 to the Declaration of Louis Tompros are
15 hereby

16 _____ SUSTAINED. _____ OVERRULED.
17

18 **U. Objection Number 31**

19 Material Objected To: Exhibit 21 (Dkt. 48-24) to the Declaration of Louis
20 Tompros.

21 Grounds for Objection: Yuga Labs objects on the same grounds as its
22 objections stated in Objection Number 11 that the Court should not consider evidence
23 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

24 Yuga Labs objects that this webpage is not properly the subject of judicial
25 notice and Defendants have not sought judicial notice of this Exhibit 21. Fed. R.
26 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 21 for the
27 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
28 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 21 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects that Exhibit 21 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 21, and
6 although Exhibit 21 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9
10 Plaintiff's objections to Exhibit 21 to the Declaration of Louis Tompros are
11 hereby

12 _____ SUSTAINED. _____ OVERRULED.
13

14 **V. Objection Number 32**

15 Material Objected To: Exhibit 22 (Dkt. 48-25) to the Declaration of Louis
16 Tompros.

17 Grounds for Objection: Yuga Labs objects on the same grounds as its
18 objections stated in Objection Number 11 that the Court should not consider evidence
19 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

20 Yuga Labs objects that this webpage is not properly the subject of judicial
21 notice and Defendants have not sought judicial notice of this Exhibit 22. Fed. R.
22 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 22 for the
23 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
24 litigation.

25 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
26 Exhibit 22 does not make a fact regarding Defendants' infringement of the BAYC
27 Marks more or less probable.

1 Yuga Labs further objects that Exhibit 22 is not authenticated. Fed. R.
2 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 22, and
3 although Exhibit 22 contains information which might answer those concerns,
4 Mr. Tompros does not establish those facts and the document is not self-
5 authenticating.

6
7 Plaintiff's objections to Exhibit 22 to the Declaration of Louis Tompros are
8 hereby

9 _____ SUSTAINED. _____ OVERRULED.
10

11 **W. Objection Number 33**

12 Material Objected To: Exhibit 23 (Dkt. 48-26) to the Declaration of Louis
13 Tompros.

14 Grounds for Objection: Yuga Labs objects on the same grounds as its
15 objections stated in Objection Number 11 that the Court should not consider evidence
16 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

17 Yuga Labs objects that this webpage is not properly the subject of judicial
18 notice and Defendants have not sought judicial notice of this Exhibit 23. Fed. R.
19 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 23 for the
20 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
21 litigation.

22 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
23 Exhibit 23 does not make a fact regarding Defendants' infringement of the BAYC
24 Marks more or less probable.

25 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
26 probative value of Exhibit 23 is substantially outweighed by the danger of unfair
27 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
28

1 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
2 to introduce Exhibit 23 to make that unfounded (and false) accusation.

3 Yuga Labs further objects that Exhibit 23 is not authenticated. Fed. R.
4 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 23, and
5 although Exhibit 23 contains information which might answer those concerns,
6 Mr. Tompros does not establish those facts and the document is not self-
7 authenticating.

8 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
9 improper hearsay.

10
11 Plaintiff's objections to Exhibit 23 to the Declaration of Louis Tompros are
12 hereby

13 _____ SUSTAINED. _____ OVERRULED.

14
15 **X. Objection Number 34**

16 Material Objected To: Exhibit 24 (Dkt. 48-27) to the Declaration of Louis
17 Tompros.

18 Grounds for Objection: Yuga Labs objects on the same grounds as its
19 objections stated in Objection Number 11 that the Court should not consider evidence
20 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

21 Yuga Labs objects that this webpage is not properly the subject of judicial
22 notice and Defendants have not sought judicial notice of this Exhibit 24. Fed. R.
23 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 24 for the
24 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
25 litigation.

26 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
27 Exhibit 24 does not make a fact regarding Defendants' infringement of the BAYC
28 Marks more or less probable.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
2 probative value of Exhibit 24 is substantially outweighed by the danger of unfair
3 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
4 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
5 to introduce Exhibit 24 to make that unfounded (and false) accusation.

6 Yuga Labs further objects that Exhibit 24 is not authenticated. Fed. R.
7 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 24, and
8 although Exhibit 24 contains information which might answer those concerns,
9 Mr. Tompros does not establish those facts and the document is not self-
10 authenticating.

11 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
12 improper hearsay.

13
14 Plaintiff's objections to Exhibit 24 to the Declaration of Louis Tompros are
15 hereby

16 _____ SUSTAINED. _____ OVERRULED.
17

18 **Y. Objection Number 35**

19 Material Objected To: Exhibit 25 (Dkt. 48-28) to the Declaration of Louis
20 Tompros.

21 Grounds for Objection: Yuga Labs objects on the same grounds as its
22 objections stated in Objection Number 11 that the Court should not consider evidence
23 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

24 Yuga Labs objects that this Exhibit 25 showing social media posts is not
25 properly the subject of judicial notice and Defendants have not sought judicial notice
26 of this Exhibit 25. Fed. R. Evid. 201. Yuga Labs further objects that Defendants
27 offer Exhibit 25 for the improper purposes of harassing Yuga Labs and needlessly
28 increasing the cost of litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 25 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects pursuant to Federal Rule of Evidence 403 that any
5 probative value of Exhibit 25 is substantially outweighed by the danger of unfair
6 prejudice or confusing the issues. Defendants lack any foundation to assert (falsely)
7 that Yuga Labs' founders are associated with the "alt-right" and yet Defendants seek
8 to introduce Exhibit 25 to make that unfounded (and false) accusation.

9 Yuga Labs further objects that Exhibit 25 is not authenticated. Fed. R.
10 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 25, and
11 although Exhibit 25 contains information which might answer those concerns,
12 Mr. Tompros does not establish those facts and the document is not self-
13 authenticating.

14 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
15 improper hearsay.

16
17 Plaintiff's objections to Exhibit 25 to the Declaration of Louis Tompros are
18 hereby

19 _____ SUSTAINED. _____ OVERRULED.

21 **Z. Objection Number 36**

22 Material Objected To: Exhibit 26 (Dkt. 48-29) to the Declaration of Louis
23 Tompros.

24 Grounds for Objection: Yuga Labs objects on the same grounds as its
25 objections stated in Objection Number 11 that the Court should not consider evidence
26 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

27 Yuga Labs objects that this webpage is not properly the subject of judicial
28 notice and Defendants have not sought judicial notice of this Exhibit 26. Fed. R.

1 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 26 for the
2 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
3 litigation.

4 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
5 Exhibit 26 does not make a fact regarding Defendants' infringement of the BAYC
6 Marks more or less probable.

7 Yuga Labs further objects that Exhibit 26 is not authenticated. Fed. R.
8 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 26, and
9 although Exhibit 26 contains information which might answer those concerns,
10 Mr. Tompros does not establish those facts and the document is not self-
11 authenticating.

12 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
13 improper hearsay.

14
15 Plaintiff's objections to Exhibit 26 to the Declaration of Louis Tompros are
16 hereby

17 _____ SUSTAINED. _____ OVERRULED.

18
19 **AA. Objection Number 37**

20 Material Objected To: Exhibit 27 (Dkt. 48-30) to the Declaration of Louis
21 Tompros.

22 Grounds for Objection: Yuga Labs objects on the same grounds as its
23 objections stated in Objection Number 11 that the Court should not consider evidence
24 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

25 Yuga Labs objects that this social media thread is not properly the subject of
26 judicial notice and Defendants have not sought judicial notice of this Exhibit 27. Fed.
27 R. Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 27 for the
28

1 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
2 litigation.

3 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
4 Exhibit 27 does not make a fact regarding Defendants' infringement of the BAYC
5 Marks more or less probable.

6 Yuga Labs further objects that Exhibit 27 is not authenticated. Fed. R.
7 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 27, and
8 although Exhibit 27 contains information which might answer those concerns,
9 Mr. Tompros does not establish those facts and the document is not self-
10 authenticating.

11 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
12 improper hearsay.

13
14 Plaintiff's objections to Exhibit 27 to the Declaration of Louis Tompros are
15 hereby

16 ____ SUSTAINED. ____ OVERRULED.

17
18 **BB. Objection Number 38**

19 Material Objected To: Exhibit 28 (Dkt. 48-31) to the Declaration of Louis
20 Tompros.

21 Grounds for Objection: Yuga Labs objects on the same grounds as its
22 objections stated in Objection Number 11 that the Court should not consider evidence
23 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

24 Yuga Labs objects that this social media thread is not properly the subject of
25 judicial notice and Defendants have not sought judicial notice of this Exhibit 28. Fed.
26 R. Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 28 for the
27 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
28 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 28 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects that Exhibit 28 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 28, and
6 although Exhibit 28 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 28 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **CC. Objection Number 39**

17 Material Objected To: Exhibit 29 (Dkt. 48-32) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this webpage is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 29. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 29 for the
25 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
26 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 29 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects that Exhibit 29 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 29, and
6 although Exhibit 29 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 29 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **DD. Objection Number 40**

17 Material Objected To: Exhibit 30 (Dkt. 48-33) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this webpage is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 30. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 30 for the
25 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
26 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 30 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects that Exhibit 30 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 30, and
6 although Exhibit 30 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 30 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **EE. Objection Number 41**

17 Material Objected To: Exhibit 31 (Dkt. 48-34) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this webpage is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 31. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 31 for the
25 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
26 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 31 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects that Exhibit 31 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 31, and
6 although Exhibit 31 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 31 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **FF. Objection Number 42**

17 Material Objected To: Exhibit 32 (Dkt. 48-35) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this webpage is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 32. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 32 for the
25 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
26 litigation.

1 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this Exhibit
2 32 does not make a fact regarding Defendants' infringement of the BAYC Marks
3 more or less probable.

4 Yuga Labs further objects that Exhibit 32 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 32, and
6 although Exhibit 32 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 32 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **GG. Objection Number 43**

17 Material Objected To: Exhibit 33 (Dkt. 48-36) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this webpage is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 33. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 33 for the
25 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
26 litigation.

1 Yuga Labs objects pursuant to Federal Rule of Evidence 401 that this Exhibit
2 33 does not make a fact regarding Defendants' infringement of the BAYC Marks
3 more or less probable.

4 Yuga Labs further objects that Exhibit 33 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 33, and
6 although Exhibit 33 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 33 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 **HH. Objection Number 44**

17 Material Objected To: Exhibit 34 (Dkt. 48-37) to the Declaration of Louis
18 Tompros.

19 Grounds for Objection: Yuga Labs objects on the same grounds as its
20 objections stated in Objection Number 11 that the Court should not consider evidence
21 outside of the pleadings in deciding the Rule 12(b)(6) or anti-SLAPP motions.

22 Yuga Labs objects that this Exhibit 34 is not properly the subject of judicial
23 notice and Defendants have not sought judicial notice of this Exhibit 34. Fed. R.
24 Evid. 201. Yuga Labs further objects that Defendants offer Exhibit 34 for the
25 improper purposes of harassing Yuga Labs and needlessly increasing the cost of
26 litigation.

1 Yuga Labs further objects pursuant to Federal Rule of Evidence 401 that this
2 Exhibit 34 does not make a fact regarding Defendants' infringement of the BAYC
3 Marks more or less probable.

4 Yuga Labs further objects that Exhibit 34 is not authenticated. Fed. R.
5 Evid. 901. Mr. Tompros does not declare where or when he acquired Exhibit 34, and
6 although Exhibit 34 contains information which might answer those concerns,
7 Mr. Tompros does not establish those facts and the document is not self-
8 authenticating.

9 Yuga Labs further objects pursuant to Federal Rule of Evidence 801 as
10 improper hearsay.

11
12 Plaintiff's objections to Exhibit 34 to the Declaration of Louis Tompros are
13 hereby

14 _____ SUSTAINED. _____ OVERRULED.
15

16 Dated: October 17, 2022

FENWICK & WEST LLP

17
18 By: /s/ Eric Ball
Eric Ball
19 Attorneys for Plaintiff
20 YUGA LABS, INC.
21
22
23
24
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26
27
28

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13

14
15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**
17 **WESTERN DIVISION**

18
19 Yuga Labs, Inc.,

20 Plaintiff,

21 v.

22 Ryder Ripps, Jeremy Cahen, Does 1-10,

23
24 Defendants.
25
26

27 Case No. 2:22-cv-04355-JFW-JEM
28

**NOTICE OF MOTION; ANTI-
SLAPP MOTION TO STRIKE AND
MOTION TO DISMISS**

Filed Pursuant to Court Order (Dkt. 44).
Hearing Date: Nov. 7, 2022, at 1:30
p.m., Pursuant to Standing Order ¶ 5(a)
Judge: Hon. John F. Walter

NOTICE OF MOTION AND MOTION

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL
OF RECORD:

PLEASE TAKE NOTICE that on November 7, 2022, at 1:30 p.m., or at another time convenient for the Court, in Courtroom 7A of the First Street United States Courthouse at 350 W. 1st Street, Los Angeles, California, 90012 or in such manner as the Court directs, Defendants Ryder Ripps and Jeremy Cahen will move this Court to strike Yuga Labs, Inc.'s California law causes of action and award fees and costs pursuant to Cal. Civ. Proc. Code. § 425.16(c) and dismiss Yuga Labs Inc.'s federal law causes of action pursuant to Fed. R. Civ. P 12(b)(6), or in the alternative, to dismiss Yuga Labs, Inc.'s Complaint pursuant to Fed. R. Civ. P. 12(b)(6) in its entirety.

This motion is made following conferences of counsel pursuant to L.R. 7-3 which took place on August 5, 2022, and August 23, 2022. Yuga Labs, Inc. indicated that it disagreed with the substance of Ryder Ripples and Jeremy Cahen's motion and was not willing to stipulate to dismissal. Defendants are re-filing their motion to strike and motion to dismiss as "previously filed" pursuant to the Court's September 26, 2022 order (Dkt. 44).

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STATEMENT OF RELIEF SOUGHT

2 Defendants Ryder Ripps and Jeremy Cahen respectfully request that the Court
3 strike Yuga Labs, Inc.'s Claims 4-11 in the Complaint and award fees and costs
4 pursuant to Cal. Civ. Proc. Code. § 425.16(c) and dismiss Yuga Labs, Inc.'s Claims 1-
5 3 pursuant to Rule 12(b)(6), or in the alternative, dismiss Yuga Labs, Inc.'s Complaint
6 pursuant to Rule 12(b)(6) in its entirety.

9 || Dated: October 3, 2022

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12	Federal Rule of Civil Procedure Rule 12(b)(6)	10, 25
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1 **I. INTRODUCTION**

2 This lawsuit is an attempt to silence an artist who used his craft to call out a
 3 multi-billion-dollar company built on racist and neo-Nazi dog whistles. Ryder Rippss
 4 used conceptual art to critique hateful imagery in the popular “Bored Ape Yacht
 5 Club” project—a commercially successful collection of “NFTs” sold by the plaintiff,
 6 Yuga Labs, Inc. (“Yuga”). When called out on their racism, Yuga sued Mr. Rippss not
 7 for defamation, but for **trademark** infringement. The First Amendment and the
 8 *Rogers* test preclude exactly this kind of abusive trademark infringement lawsuit.

9 Mr. Rippss’s artistic criticism is well founded and directly connected to Yuga’s
 10 trademarks. For example, Yuga’s “BA YC logo” imitates the Nazi Totenkopf emblem
 11 for the Schutzstaffel (SS), which was the Nazi organization primarily responsible for
 12 the Holocaust. Below is a side-by-side comparison of the BAYC logo, the Nazi SS
 13 Totenkopf, and the satirical logo Mr. Rippss created to criticize Yuga:



20 Yuga quietly embedded its company’s trademarks, artwork, and products with these
 21 coded “dog whistles,” drawing from neo-Nazi culture and racist communities within
 22 forums like 4chan.org/pol/—while simultaneously racking up celebrity endorsements.

23 Mr. Rippss brought attention to Yuga’s conduct by creating the satirical NFT
 24 collection called the “Ryder Rippss Bored Ape Yacht Club” (“RR/BAYC”). Though
 25 Yuga never brought action against *any* of the dozens of commercial “ape” NFT
 26 collections, it did—without warning—bring this action against Mr. Rippss and his
 27 business partner, Jeremy Cahen. Yuga’s purpose was obvious: to bully Mr. Rippss and
 28 Mr. Cahen into silence. But this is precisely why anti-SLAPP statutes exist.

1 **II. BACKGROUND**2 **A. Mr. Ripps Is a Recognized Artist**

3 Mr. Ripps is a visual artist and creative designer known for creating artwork
4 that comments on the boundaries between art, the internet, and commerce. Ripps
5 Decl. ¶ 1. His work examines popular culture and sheds light on how individuals
6 move through our increasingly digitized world. *Id.* at ¶ 2. The *New York Times* has
7 recognized Mr. Ripps's contribution to conceptual art, describing him as "An Artist of
8 the Internet," and *Forbes* listed Mr. Ripps in the 2016 class of 30 under 30: Art &
9 Style. Ex. 3 ("Ryder Ripps: An Artist of the Internet"); Ex. 4 (*Forbes* 30 Under 30:
10 Art & Style).

11 Many important exhibits have showcased Mr. Ripps's work. For example, in
12 2015, Mr. Ripps had an exhibition at Postmasters Gallery in New York City—a
13 gallery well-known for representing artists at the cutting edge of technology. Ex. 5
14 (Review in *The Brooklyn Rail*). Mr. Ripps reappropriated Instagram posts from the
15 model Adrienne Ho and digitally manipulated them with a liquefying photo editing
16 tool. *Id.* at 3. Postmasters described the portraits as exposing how we "reflexively
17 simulate reality online" and have "authenticity manipulated by multiple filters and
18 amplified by mass circulation." Ex. 6 (Postmasters Listing) at 1. Mr. Ripps was also
19 recognized in 2015 as a "bold digital artist and entrepreneur" for remaking the vast
20 internet in miniature with an installation called *Alone Together*. Ex. 7 (Review in
21 *Complex*) at 1.

22 In addition to creating fine art, Mr. Ripps has also led creative direction and
23 design projects for companies like Nike and Red Bull, developed branding for
24 products such as Soylent meal replacements, worked closely with Kanye West at his
25 creative agency *Donda*, and has created art and executed creative direction with many
26 leading musicians such as Grimes, James Blake, MIA, Pop Smoke, Pusha T, Tame
27 Impala, and Travis Scott. Ripps. Decl. ¶ 3.

28

1 Conceptual, performance, and appropriation art are among Mr. Rипps's most
2 important and popular modes of artistic expression. In 2021, Mr. Rипps used
3 performance and appropriation art to comment on the purpose and nature of NFTs
4 ("non-fungible tokens"). An NFT is an entry on a decentralized digital ledger known
5 as a "blockchain." Each NFT is unique by design and cannot be copied. But NFTs
6 also often link to other content, such as images, that are easily copied. A purported
7 utility of NFTs in art is verifiable provenance that makes it possible to distinguish
8 original digital works from otherwise perfect duplicates. Mr. Rипps created his own
9 NFT that linked to a high-resolution version of the image associated with another NFT
10 (the "CryptoPunk #3100 NFT"). Ex. 8 ("CryptoPunks Get Punked"). One element of
11 this artwork was to comment on what it means to "own" an NFT—to control a digital
12 token (data in a blockchain) but not the corresponding digital image. *Id.* at 2.

13 **B. Yuga Systematically Embedded Racist Messages and Imagery in Its**
14 **Trademarks and Products**

15 Yuga sold a series of 10,000 NFTs known as the Bored Ape Yacht Club
16 ("BAYC"). Each BAYC NFT is associated with an image of an anthropomorphized
17 ape cartoon. The BAYC collection, related promotional activities, and Yuga's
18 corporate designs are systematically embedded with dog whistles common among
19 neo-Nazis, alt-right groups, and racist bulletins within websites like 4chan.org/pol/.
20 The presence of this symbolism is too prevalent to be a coincidence.

21 As noted earlier, Yuga's BAYC logo imitates the Nazi SS Totenkopf. The
22 BAYC logo simply replaces the human skull and bones with an ape skull and alters
23 the text so that it refers to the BAYC collection. Ex. 2 (<https://gordongoner.com>) at 4.
24 Yuga copied all salient features of the Totenkopf in the BAYC logo, including the
25 stylization and orientation of the skull, rough edges around the emblem, text and
26 image layout, and color scheme. The BAYC logo even copies the 18 teeth in the
27 symbol's skull. The Anti-Defamation League has recognized that "18 is a white

1 supremacists alphanumeric code for Adolf Hitler" (because A and H are the first the
 2 eighth letters in of the alphabet). Ex. 9 (ADL: Hate Symbol 18).

3 The founders of Yuga also embedded a neo-Nazi dog whistle in the name of
 4 their company itself. The word "Yuga" references the alt-right phrase "Surf the Kali
 5 Yuga." Kali Yuga is the age of sin and conflict in Hinduism, and alt-right groups use
 6 the phrase "Surf the Kali Yuga" as an esoteric way of saying enjoy sin and embrace
 7 conflict. Ex. 10 (*Neoecofascism: The Example of the United States*) at 110; Ex. 11
 8 ("The Secret Histories of the Radical Right on 4chan/pol") at 8; Ex. 12 ("The Alt-
 9 Right Apocalypse") at 1-2. High profile neo-Nazis, including white supremacist
 10 Richard Spencer, routinely discuss the "Kali Yuga" and admit that Yuga is "evoking
 11 Nazi iconography." Ex. 13 (July 31, 2022, 5:54 p.m. Spencer Twitter Post) at 1; Ex.
 12 14 (August 22, 2022, 2:22 p.m. Brennan Twitter Post) at 1; Ex. 15 (Spencer Messages
 13 to Brennan) at 2. Yuga co-founder Wylie Aronow was aware of (and apparently
 14 embraced) this neo-Nazi dog whistle as part of his public Twitter profile, which in
 15 2020 listed "Kali Yuga" as his location. Ex. 16 ("Thousands of Lies: Wylie Aronow
 16 Acknowledges Longtime Friendship with 'Alt-Right' Publisher") at 9; *see also id.* at
 17 4, 5 (Aronow acknowledging that he is thanked in the book *Thousands of Lies*, which
 18 "runs rampant with racism, antisemitism, pedophilia, white supremacy, misogyny and
 19 rape fantasies," for being "instrumental to epiphanies that shape it fundamentally.").

20 The "Surf the Kali Yuga" dog whistle is also often used by neo-Nazis
 21 specifically in conjunction with parts of the Totenkopf, as shown in the neo-Nazi shirt:



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1 Ex. 17 (“Matthew Warner: From GamerGate to Identity Evropa”) at 6; Ex. 18 (Kali
2 Yuga shirt) at 1. The Totenkopf’s skull and bones depicted on the shirt is one of the
3 most frequently appearing images on 4chan.org/pol/ bulletins discussing the Kali
4 Yuga. Ex. 11 at 9. In other words, the company name “Yuga” and the Bored Ape
5 Yacht Club logo contain corresponding neo-Nazi dog whistles.

6 The BAYC collection itself also contains obvious racist messaging and
7 imagery. The NFTs display anthropomorphized apes in an act of simianization—
8 disparaging ethnic or racial groups by depicting them as apes. Ex. 2 at 2-3. Yuga’s
9 use of simianization has come under significant public scrutiny. Ex. 19 (Twitter Posts
10 Compilation). Carla Hill, a senior researcher at the Anti-Defamation League’s Center
11 for Extremism, has criticized the BAYC’s depiction of apes with hip hop traits and
12 apes wearing a kamikaze headband. Ex. 20 (“Bored Ape Yacht Club finally responds
13 to neo-Nazism accusation”) at 6. Below are two NFTs that display these features:



BAYC #3721



BAYC #6281

22 The image on the left (BAYC #3721) depicts a gold jacket and gold chain, which
23 Yuga refers to as “Hip Hop” clothing, in reference to a popular musical genre and
24 lifestyle pioneered by African Americans. Ex. 21 (BAYC #3721). The image on the
25 right (BAYC #6281) depicts a kamikaze headband, which Yuga refers to as a “Sushi
26 Chef Headband.” Ex. 22 (BAYC #6281).

1 The racist dog whistles that Yuga has embedded in BAYC and associated
2 projects are too numerous to catalog here. For example, Yuga has gone so far as to
3 create metadata that includes “Stone Hole Jackson” in reference to the confederate
4 general Stonewall Jackson. Ex. 23 (Otherdeed Metadata Provenance Information).
5 Yuga later changed the metadata to erase this offensive reference. *Id.* More examples
6 can be seen in the YouTube video “*The Bored Ape Conspiracy (theory) - A Cultural*
7 *Disease*” (available at <https://www.youtube.com/watch?v=tRPHZQFuT24>). But a
8 key part of Mr. Ripps’s work has been to document them, including at his website
9 <https://gordongoner.com/>.

10 Yuga’s systematic use of racist and neo-Nazi messages and imagery appears to
11 be by deliberate design, and, by its co-founder’s admission are not “just random.”
12 Greg Solano, Yuga’s co-founder, stated in an interview that “[i]t’s like Wittgenstein’s
13 ‘let the unutterable be conveyed unutterably,’ or Hemingway’s iceberg theory. We
14 knew all about what this world was, and why these apes are this way. And that
15 somebody else might get a little tingle on their neck looking at it, thinking, ‘Yeah, this
16 is kind of different. ***This isn’t just random.***’” Ex. 24 (“The Bored Ape Founders
17 Haven’t Yet Joined the Yacht Club”) at 6 (emphasis added).

18 **C. Mr. Ripps’s Artistic Project Is a Protest of Yuga’s Dog Whistles**

19 Mr. Ripps created the RR/BAYC project as a critique of Yuga’s use of racist
20 and neo-Nazi dog whistles. The RR/BAYC project is a collection of NFTs that point
21 to the same online digital images as the BAYC collection but use verifiably unique
22 entries on the blockchain. Ripps Decl. ¶ 8. Mr. Ripps’s use of pointers to the same
23 images is a form of “appropriation art” that serves several purposes: (1) to bring
24 attention to Yuga’s use of racist and neo-Nazi messages and imagery, (2) to expose
25 Yuga’s use of unwitting celebrities and popular brands to disseminate offensive
26 material, (3) to create social pressure demanding that Yuga take responsibility for its
27 actions, and (4) to educate the public about the technical nature and utility of NFTs.

1 Ripps Decl. ¶ 8; Ex. 1 (<https://rrbayc.com/>) at 1; Ex. 25 (May 14, 2022, 9:52 p.m.,
2 Twitter Archive).

3 As early as November 2021, Mr. Ripps began exposing Yuga's misconduct
4 through his Twitter and Instagram profiles, podcasts, and cooperation with
5 investigative journalists, and by creating the website <https://gordongoner.com>. Ripps
6 Decl. ¶ 5. Mr. Ripps criticized Yuga's use of neo-Nazi and alt-right dog whistles, and
7 also spoke about the countless celebrities whom Yuga had promoting its offensive
8 material including Tom Brady, Kevin Hart, Jimmy Fallon, Shaquille O'Neal, Mark
9 Cuban, Justin Bieber, Serena Williams, Paris Hilton, LaMelo Ball, Timbaland,
10 Stephen Curry, Eminem, Madonna, Post Malone, Ben Simmons, Steve Aoki, Neymar
11 Jr., Gwyneth Paltrow, Snoop Dog, and others. Ex. 26 ("The All-Star owners of the
12 Bored Ape Yacht Club") at 2-6.

13 Mr. Ripps created the RR/BAYC project in connection with his efforts to
14 expose Yuga's neo-Nazi and alt-right references. The project began organically, with
15 Mr. Ripps receiving requests for RR/BAYC NFTs on Twitter from like-minded users
16 critical of Yuga. Ripps Decl. ¶ 9. Later, Mr. Ripps posted on Twitter that he would
17 create his satirical NFTs for anyone who requested one for the price of 0.1 Ethereum
18 (currently roughly \$150). Ex. 27 (May 14, 2022, 7:34 p.m., Mr. Ripps Twitter Post).
19 He explained to his followers that "ryder ripps bayc vision is to create an army of
20 educators" with respect to Yuga's connections to neo-Nazi and alt-right culture. Ex.
21 28 (May 15, 2022, 1:21 a.m., Mr. Ripps Twitter Post).

22 The RR/BAYC NFTs quickly became popular, and Mr. Ripps eventually set up
23 the website <https://rrbayc.com>. Ex. 1. The website ensured that collectors understood
24 the satirical message of the project and that they were not purchasing a BAYC NFT.
25 The front page of the website explained that "RR/BAYC uses satire and appropriation
26 to protest and educate people regarding the Bored Ape Yacht Club and the framework
27
28

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1 of NFTs.” *Id.* at 1. Mr. Ripps further required each purchaser to adopt the following
 2 disclaimer:



3
 4
 5
 6
 7
 8 By purchasing this Ryder Ripps artwork in the form of an NFT,
 9 you understand that this is a new mint of BAYC imagery, re-
 10 contextualizing it for educational purposes, as protest and
 11 satirical commentary. You cannot copy an NFT. Please see the
 12 RR/BAYC contract here to verify provenance: [Etherscan](#). By
 13 reserving your RR/BAYC, you are purchasing a hold for an
 14 order that will be fulfilled or rejected/refunded by Ryder within
 15 24h (Depending on the vibe of your wallet and the mood of
 16 Ryder at the time).

17 Ripps Decl. ¶ 11. As shown above, the disclaimer required purchasers to
 18 acknowledge that RR/BAYC NFTs are “a new mint of BAYC imagery,
 19 recontextualizing it for educational purposes, as protest and satirical commentary[.]”

20 Mr. Ripps’s criticism of Yuga has become well-known. Even Yuga’s
 21 Complaint discusses the criticism Mr. Ripps has made about Yuga, alleging that Mr.
 22 Ripps has described RR/BAYC as “satire” (Compl. ¶ 5) and has encouraged collectors
 23 to purchase RR/BAYC NFTs to *protest* Yuga (Compl. ¶¶ 56, 72, 116). Yuga also
 24 concedes that Mr. Ripps has conducted “an interview with a popular meme page” to
 25 discuss Yuga’s use of racist dog whistles. Compl. ¶ 50. The Complaint further
 26 acknowledges that Mr. Ripps’s message has “reached a significant number of people
 27 on social media.” Compl. ¶ 51.

28 The public protest against Yuga led to the #BURNBAYC movement
 29 (spearheaded by the popular YouTuber Phlion). Social media influencers and
 30 celebrity YouTubers have been using the #BURNBAYC hashtag, which began
 31 trending the same week the RR/BAYC collection sold out. Ex. 29 (“Bored Ape Yacht

1 Club (BAYC) Propagating NFT Racism?”) at 2; Ex. 30 (“Bored Ape Yacht Club’s
2 Creators Declared War on a Vocal Critic. Could it Backfire?”) at 5. The question of
3 whether BAYC is racist has become a “viral debate” and mainstream newspapers
4 reported that #BURNBAYC is a “public opinion storm” and “too large to ignore.”
5 Ex. 31 (“Bored Ape Yacht Club Wants Ryder Ripples to Cease and Desist”) at 5; Ex. 32
6 (“BAYC caught in public opinion storm over Nazi club NFT”) at 1. Ex. 33 (“BAYC
7 founders call Nazi conspiracy video ‘crazy disinformation campaign’”) at 1. As a
8 result, Mr. Ripples’s work is today described as being “pretty brilliant from an artistic
9 point of view.” Ex. 34 (“Yuga Fires Back at #BURNBAYC Creator”) at 4.

10 **D. Yuga Is Attempting To Silence Mr. Ripples**

11 Yuga has been on a campaign aimed at silencing Mr. Ripples’s artistic expression
12 and related criticism of Yuga’s connections to neo-Nazi and alt-right culture. For
13 example, when Mr. Ripples began to speak out about the BAYC collection, Yuga’s
14 talent manager, Guy Oseary, called Mr. Ripples to make vague threats. Ripples Decl. ¶ 7.
15 Oseary stated that “I can be a nice guy or I can be a not nice guy” and that he could
16 make Mr. Ripples’s life hard if he continued to call out Yuga. *Id.* Oseary also offered
17 to introduce Mr. Ripples to Kanye West (without realizing that Mr. Ripples had already
18 worked with West) and added Mr. Ripples to a group text message with West’s
19 manager. *Id.* The next week Oseary left a voice memo thanking Mr. Ripples for
20 remaining silent. *Id.* But Oseary’s statements only galvanized Mr. Ripples to continue
21 his criticism of Yuga and eventually to create the RR/BAYC work.

22 This lawsuit is the latest Yuga attempt to bully Mr. Ripples into silence. There
23 are dozens of entities that create knock-off ape NFTs that make no artistic or critical
24 commentary. Ripples Decl. ¶ 15, Ex. 1 (List of NFT Projects). Tellingly, Yuga has not
25 sued *any* entities that are intentionally exploiting Yuga’s goodwill. Instead, Yuga has
26 sued only Mr. Ripples and Mr. Cahen for their successful protest and criticism of
27 Yuga’s systematic use of racist and neo-Nazi messages and imagery.

1 **III. LEGAL STANDARD**

2 Rule 12(f) of the Federal Rules of Civil Procedure provides that “[t]he court
3 may strike from a pleading an insufficient defense or any redundant, immaterial,
4 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).

5 The California Anti-SLAPP statute explains that Rule 12(f) can “allow for early
6 dismissal of meritless First Amendment cases aimed at chilling expression through
7 costly, time-consuming litigation.” *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148,
8 1155 (9th Cir. 2021) (internal brackets omitted). The statute provides that a defendant
9 may strike a complaint if it “arises from any act of that person in furtherance of the
10 person’s right of petition or free speech under the United States or California
11 Constitution in connection with a public issue.”” *Vess v. Ciba-Geigy Corp. USA*, 317
12 F.3d 1097, 1109 (9th Cir. 2003) (quoting Cal. Civ. Proc. Code § 425.16(b)(1)).

13 Courts grant anti-SLAPP motions to strike at the pleadings stage when (1) the
14 defendant shows that “an act in furtherance of protected expression is being
15 challenged” and (2) the plaintiff fails to demonstrate that “the complaint is legally
16 sufficient.” *Planned Parenthood Fed’n of America, Inc. v. Ctr. for Med. Progress*,
17 890 F.3d 828, 833 (9th Cir. 2018).

18 **IV. ARGUMENT**

19 The Complaint’s state law claims should be stricken under the anti-SLAPP
20 statute because (1) the accused RR/BAYC project is protected speech made in
21 connection with a public issue and (2) the Complaint does not allege legally sufficient
22 facts to support a cause of action. The Complaint, including Yuga’s federal law
23 claims, should also be dismissed under Rule 12(b)(6) for failure to state a claim.

24 **A. The RR/BAYC Project Is Protected Speech Made In Connection
25 With A Public Issue**

26 Anti-SLAPP immunity protects the accused RR/BAYC project because the
27 project is performance and appropriation art that expresses criticism against Yuga’s
28 use of racist, neo-Nazi, and alt-right dog whistles. *Planned Parenthood*, 890 F.3d at

1 832-33 (citing Cal. Civ. P. Code. § 425.16(b)(1)) (anti-SLAPP immunity applies to
 2 acts made (1) in furtherance of the constitutional right of free speech and (2) in
 3 connection with a public issue).

4 **i. Mr. Ripps Created The RR/BAYC Project In Furtherance of
 5 His Constitutional Right of Free Speech**

6 The First Amendment protects expressive works, and an artwork is expressive
 7 if it is “communicating ideas or expressing points of view.” VIP Prods. LLC v. Jack
Daniel’s Props., Inc., 953 F.3d 1170, 1174 (9th Cir. 2020) (citing Mattel, Inc. v. MCA
Records, 296 F.3d 894, 900 (9th Cir. 2002)). As explained below, the RR/BAYC
 9 project abundantly communicates protest and criticism of Yuga’s references to racist
 10 and neo-Nazi themes.

11 Mr. Ripps created the RR/BAYC project with the specific aim of publicizing
 12 how Yuga’s founders have embedded Yuga and the BAYC collection with racist and
 13 neo-Nazi dog whistles. Ripps Decl. ¶ 8. Before launching the RR/BAYC project, Mr.
 14 Ripps used his Twitter and Instagram profiles to expose Yuga. Ripps Decl. ¶ 5. Mr.
 15 Ripps also released the website <https://gordongoner.com> to document Yuga’s
 16 references to neo-Nazi and alt-right culture. *Id.*

17 The RR/BAYC project elevated Mr. Ripps’s criticism of Yuga. Collectors
 18 commissioned RR/BAYC NFTs as an act of protest against Yuga and to form a
 19 community that advances Mr. Ripps’s messages regarding Yuga’s use of racist dog
 20 whistles. Ripps Decl. ¶ 9. As Mr. Ripps explained on the website that sold his NFTs
 21 (<https://rrbayc.com>), “RR/BAYC uses satire and appropriation to protest and educate
 22 people regarding The Bored Ape Yacht Club and the framework of NFTs.” Ex. 1 at 1.
 23 Mr. Ripps also ensured that collectors understood the satirical messages of his NFTs
 24 by requiring every purchaser to sign a disclaimer acknowledging that the RR/BAYC
 25 NFTs are “a new mint of BAYC imagery, recontextualizing it for educational
 26 purposes, as protest and satirical commentary.” Ripps Decl. ¶ 11.

1 The ideas that the RR/BAYC project expressed quickly gained notoriety. Mr.
2 Rипps's NFTs sold out within weeks and, as Yuga admits in the Complaint, Mr.
3 Rипps's message "reached a significant number of people." Compl. ¶ 51; Rипps Decl.
4 at 10. The public protest against Yuga eventually led to the #BURNBAYC
5 movement, which demands that Yuga be held accountable for its offensive and racist
6 behavior. Ex. 29 at 2; Ex. 32 at 2. For these reasons, the RR/BAYC project has been
7 described as "pretty brilliant from an artistic point of view." Ex. 34 at 4.

8 **ii. The RR/BAYC Project Communicates Ideas In Connection
9 With A Public Issue**

10 A work is connected to a public issue if it involves (1) statements "concerning a
11 person or entity in the public eye," (2) "conduct that could directly affect a large
12 number of people beyond the direct participants," or (3) "a topic of widespread public
13 interest." *Hilton v. Hallmark Cards*, 599 F.3d 894, 906 (9th Cir. 2010). The
14 RR/BAYC project is connected to a public issue for all three of these reasons.

15 **First**, RR/BAYC NFTs express commentary about an entity (Yuga) that is in
16 the "public eye." Yuga is a \$4 billion corporation that publicly sells NFTs and
17 various related services. Compl. ¶ 20. Moreover, according to the Complaint, Yuga's
18 BAYC collection has received "significant attention from the media" and "has
19 generated massive public interest." Compl. ¶¶1, 19, 20

20 **Second**, Yuga's coded racism and neo-Nazi messages affect a large number of
21 people beyond Yuga, Mr. Rипps, and Mr. Cahen. Yuga has enlisted celebrities to
22 promote BAYC and its racist imagery including Tom Brady, Madonna, Kevin Hart,
23 Jimmy Fallon, Shaquille O'Neal, Mark Cuban, Justin Bieber, Stephen Curry,
24 Eminem, Serena Williams, Steve Aoki, LaMelo Ball, Snoop Dog, and others. Ex. 26
25 at 2-6; Compl. at ¶ 21. Yuga's BAYC has also worked with major brands including
26 Adidas, Universal Music Group, Arizona Iced Tea, Gucci, Major League Soccer, and
27 Old Navy. Compl. at ¶ 22; Rипps Decl. ¶ 6. These public endorsements show that
28 BAYC NFTs are affecting society at large, including American mainstream culture.

1 **Third**, Yuga's connection to neo-Nazi and alt-right culture is a topic of
 2 widespread public interest. Yuga's use of racist messages and imagery has been
 3 repeatedly criticized publicly. Ex. 19. Activists, including some celebrities and social
 4 media influencers, are standing up against Yuga and participating in the
 5 #BURNBAYC movement. Ex. 29 at 1. Newspapers have commented on these
 6 events, reporting that there is now a "public opinion storm" surrounding Yuga and
 7 that #BURNBAYC has become "too large to ignore." Ex. 32 at 1; Ex. 33 at 1.

8 **B. The Complaint Does Not Support A Plausible Cause of Action**

9 The Complaint is legally insufficient because Yuga has not alleged a plausible
 10 cause of action. *Planned Parenthood*, 890 F.3d at 832-33 (citing Cal. Civ. P. Code
 11 § 425.16(b)(1)) (holding the second step of anti-SLAPP requires plaintiffs to show
 12 that the complaint is legally sufficient).

13 **i. Yuga's Trademark Infringement Claims Are Legally
 14 Insufficient Under the *Rogers* Free Speech Test (Claims 4-7)**

15 Under the *Rogers* test that insulates artistic free speech from claims of
 16 trademark infringement, trademark claims are actionable only if the accused use of a
 17 trademark is "(1) not artistically relevant to the underlying work or (2) explicitly
 18 misleads consumers as to the source of the content of the work." *Dr. Suess Enters.,*
 19 *L.P. v. ComicMix LLC*, 983 F.3d 443, 462 (9th Cir. 2020). The *Rogers* test applies to
 20 all of Yuga's trademark infringement causes of action. *Twentieth Century Fox*
 21 *Television a division of Twentieth Century Fox Film Corp. v. Empire Distrib. Corp.*,
 22 875 F.3d 1192, 1195-99 (9th Cir. 2017) (applying *Rogers* test to false designation of
 23 origin, unfair competition, and false advertising under the Lanham Act and California
 24 Law); *Dr. Suess Enters.*, 983 F.3d at 461 (*Rogers* test applies to common law
 25 trademark infringement); see *Calista Enters. Ltd. v. Tenza Trading Ltd.*, 43 F. Supp.
 26 3d 1099, 1031 (9th Cir. 2014) (holding that cybersquatting claims require likelihood
 27 of confusion); *E.S.S. Ent. 200, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1098,
 28 1101 (9th Cir. 2008) (applying *Rogers* test to trademark infringement and unfair

1 competition under Cal. Bus. & Pro. Code and California common law). As explained
 2 below, Yuga has failed to plausibly allege both prongs of the *Rogers* test.

3 *First*, Yuga has conceded in its Complaint that the BAYC marks are artistically
 4 relevant to the RR/BAYC project. The *Rogers* test requires that “the level of
 5 relevance must merely be above zero[.]” *Gordon v. Drape Creative, Inc*, 909 F.3d
 6 257, 268 (9th Cir. 2018) (citation and quotation marks omitted). The allegations in
 7 the Complaint satisfy the “above zero” threshold because they include Mr. Ripps’s
 8 explanation that his project uses BAYC marks in his conceptual appropriation art as a
 9 “provocation” that serves “to illuminate what nfts are and show bayc for what it really
 10 is.” Compl. ¶ 57. Yuga also alleged that Mr. Ripps sold RR/BAYC NFTs so
 11 collectors can protest Yuga’s racist references. Compl. ¶¶ 72, 116. Yuga even
 12 alleged that Mr. Ripps promoted his project with the statement, “LONG LIVE
 13 CONCEPTUAL ART.” Compl. ¶ 57. The Complaint also incorporates by reference
 14 <https://rrbayc.com> by repeatedly referencing, discussing, and including hyperlinks to
 15 that webpage.¹ Compl. ¶¶ 34, 36, 48, 81. The webpage explains that “RR/BAYC
 16 uses satire and appropriation to protest and educate people regarding The Bored Ape
 17 Yacht Club and the framework of NFTs” and that “[t]he work is an extension of and
 18 in the spirit of other artists who have worked within the field of appropriation art.”
 19 Ex. 1 at 1 (emphasis removed). These allegations in the Complaint go well beyond
 20 the “above zero” relevance requirement because they make clear that the RR/BAYC
 21

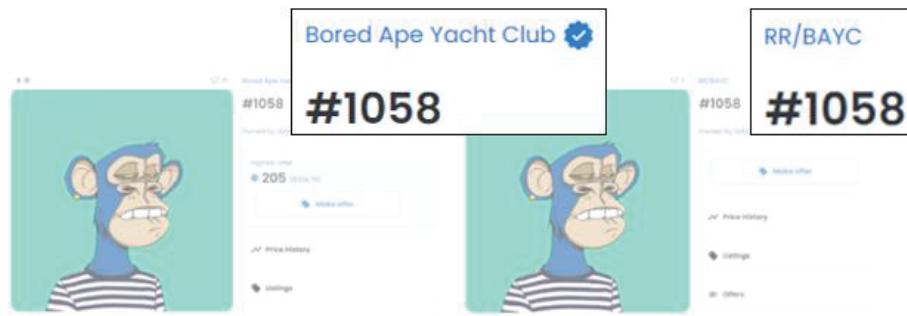
22 _____
 23 ¹ A complaint incorporates by reference documents that it discusses, repeatedly
 24 references, or includes via hyperlink. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d
 25 988, 1007 (9th Cir. 2018) (affirming incorporation by reference of a document
 26 repeatedly referenced in the complaint); *United States v. Ritchie*, 342 F.3d 903, 908
 27 (9th Cir. 2003) (“Even if a document is not attached to a complaint, it may be
 28 incorporated by reference into a complaint”); *Battle v. Taylor James, LLC*, No. 21-cv-07915-FWS-KES, 2022 WL 2162930, at *6 (C.D. Cal. June 15, 2022) (holding that a
 hyperlink in a complaint incorporated the linked document).

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1 project uses the asserted trademarks to express criticism of Yuga's use of racist dog
 2 whistles. Compl. ¶¶ 34, 36, 48, 57, 72, 81, 116.

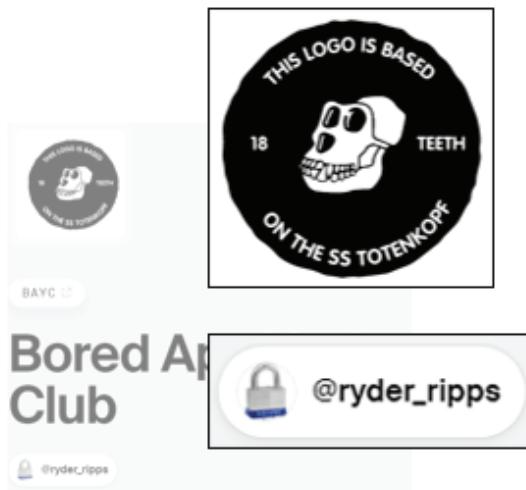
3 **Second**, Yuga has failed to allege (and cannot allege) that Mr. Rипps *explicitly*
 4 misled consumers as to the source of RR/BAYC NFTs. *Gordon, 909 F.3d at 269*
 5 ("the key here is that the creator must explicitly mislead consumers[.]"). To the
 6 contrary, Yuga repeatedly alleged that Mr. Rипps publicly communicated that
 7 RR/BAYC NFTs are not Yuga products. The Complaint in fact alleges statements
 8 that RR/BAYC NFTs are intended to "show bayc for what it really is" and allow
 9 collectors to protest Yuga and "say fuck off to @BoredApeYC!" Compl. ¶¶ 57, 72,
 10 116. According to these allegations, Mr. Rипps did not publicize the RR/BAYC NFTs
 11 as Yuga products but instead as the *antithesis* to Yuga and its offensive BAYC
 12 collection. The incorporated website, <https://rrbayc.com>, similarly shows that Mr.
 13 Rипps did not explicitly mislead consumers. Compl. ¶ 57. The website explains that
 14 Mr. Rипps was the creator of RR/BAYC NFTs and that the project uses "satire and
 15 appropriation" to criticize Yuga's BAYC collection. Ex. 1 at 1. The website also
 16 required each purchaser to sign a disclaimer acknowledging that Yuga did not create
 17 RR/BAYC NFTs. Thus, Yuga itself has alleged that Mr. Rипps took extensive steps to
 18 ensure that collectors understood the correct origin of RR/BAYC NFTs.

19 The Complaint also repeatedly alleges facts showing that RR/BAYC NFTs
 20 were differentiated from Yuga's NFTs in the marketplace. For example, the OpenSea
 21 marketplace images in paragraph 33 show that Mr. Rипps's NFTs were labeled as part
 22 of the "RR/BAYC" collection and not the "Bored Ape Yacht Club" collection:

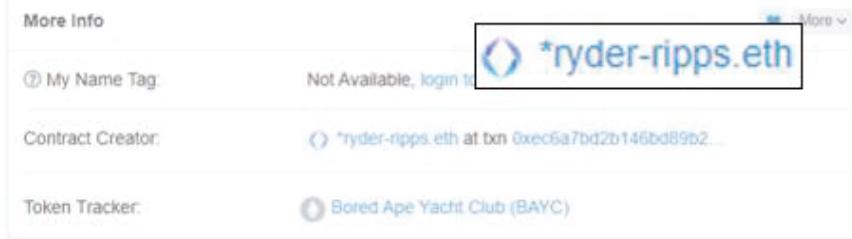


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1 Compl. ¶ 33. Paragraph 34 alleges that Mr. Ripps repeatedly used “RR/BAYC” in
 2 connection with his website <https://rrbayc.com>, where “RR” denoted “Ryder Ripps” to
 3 distinguish from Yuga’s NFTs. Compl. ¶ 34. Paragraph 37 alleges that the
 4 Foundation page contained differentiating features including the RR/BAYC satirical
 5 logo and identifying “Ryder Ripps” as the creator:



10
 11 Compl. ¶ 37. The corresponding Foundation NFT image in paragraph 38 minimizes
 12 the image so that the logo and its slogan “THIS LOGO IS BASED ON THE SS
 13 TOTENKOPF” does not appear clearly in the Complaint. Compl. ¶ 38. And in
 14 paragraph 39, the Complaint discusses, hyperlinks, and incorporates by reference the
 15 Etherscan page: <https://etherscan.io/address/0x2ee6af0dff3a1ce3f7e3414c52c48fd50d73691e> to allege that Defendants created misleading token trackers. Compl. ¶ 39.
 16 However, the page clearly and expressly identifies Mr. Ripps—not Yuga—as the
 17 token creator:



1 Yuga's allegations in relation to the Twitter pages @RR_BAYC and
 2 @BOREDAPEV3 similarly fail to allege explicitly misleading acts. The Complaint
 3 alleges no facts connecting Defendants to these accounts—which is no surprise
 4 because Defendants actually have nothing to do with these Twitter pages. Compl. ¶¶
 5 42, 44. The image in paragraph 42 of the Complaint even confirms the @RR_BAYC
 6 is “[c]ommunity ran.” Compl. ¶ 42.

7 Lastly, Yuga fails to allege any explicitly misleading acts with regards to the
 8 website <https://apemarket.com/>. The Complaint does not allege that Yuga has any
 9 trademark in “Ape Market” with or without a skull logo. Further, the hyperlinked and
 10 thereby incorporated page shows that the alleged “apemarket.com” website is not yet
 11 operating and has never had any content, let alone any misleading content. Compl. ¶
 12 46; Ex. 35 (ApeMarket Webpage).

13 In sum, the Complaint consistently alleges that Mr. Ripps *differentiated* the
 14 RR/BAYC project from Yuga's NFTs. That is the opposite of the “explicitly
 15 misleading” use that *Rogers* requires. Thus, under the *Rogers* test, Yuga's allegations
 16 render its trademark infringement claims legally insufficient.

17 **ii. Yuga's Trademark Infringement Claims Based on the
 18 RR/BAYC Project also Fail Because Use of Yuga's Alleged
 19 Marks Is Nominative Fair Use (Claims 4-7)**

20 Yuga's Complaint also alleges facts demonstrating that the alleged use of
 21 Yuga's marks qualifies as protected nominative fair use. A defendant's use of a mark
 22 is protected nominative fair use when (1) the plaintiff's product or service in question
 23 is not readily identifiable without use of the trademark; (2) only so much of the mark
 24 or marks is used as is reasonably necessary to identify the plaintiff's product or
 25 service; and (3) the user does nothing that would, in conjunction with the mark,
 26 suggest sponsorship or endorsement by the trademark holder. *Mattel Inc. v. Walking*
 27 *Mountain Prods.*, 353 F.3d 792, 810 (9th Cir. 2003) (quoting *New Kids on the Block*
 28 *v. News America Pub. Inc.*, 971 F.2d 302, 308 (9th Cir. 1992)). Nominative fair use is

1 applicable to and defeats all of Yuga's trademark infringement causes of action.
 2 *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 889, 893-98 (9th Cir. 2019)
 3 (applying nominative fair use to false designation of origin and unfair competition
 4 claims under the Lanham Act and unfair competition under California common law);
 5 *Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir. 2015) (applying
 6 nominative fair use to a federal false advertising claim); *New Kids on the Block*, 971
 7 F.2d at 305-09 (applying nominative fair use to common law trademark infringement
 8 and false advertising under California law); *BMW of N. America v. Mini Works, LLC*,
 9 463 Fed. App'x. 689 (Fed. Cir. 2011) (nonprecedential) (applying nominative fair use
 10 to cybersquatting, but holding that defendant failed to show fair use).

11 **First**, Mr. Ripps's appropriation art project would not be readily identifiable, or
 12 even possible, without using Yuga's marks to conjure up the BAYC collection—the
 13 subject of Mr. Ripps's critique. As discussed above, the Complaint includes Mr.
 14 Ripps's explanation that his project uses BAYC marks in his conceptual appropriation
 15 art as a “provocation” that serves to “show bayc for what it really is.” Compl. ¶ 57.
 16 Mr. Ripps's “needed to communicate” to his audience that the RR/BAYC project
 17 critiques Yuga and, in particular, its BAYC collection, and “so using the mark in the
 18 title and description of the program ‘accomplished this goal.’” *Applied Underwriters*,
 19 913 F.3d at 894 (quoting *Toyota Motor Sales v. Tabari*, 610 F.3d 1171, 1180 (9th Cir.
 20 2010)). Courts have routinely determined that a descriptive alternative need not be
 21 employed where, as here, the use of a mark is necessary to refer to a *specific brand or*
 22 *product*. *Applied Underwriters, Inc.* 913 F.3d at 893-94.

23 **Second**, Mr. Ripps's used BAYC's marks only to the extent reasonably
 24 necessary. The RR/BAYC project is a satirical work that uses unique and identifiable
 25 NFTs that point to the same online digital images associated with the BAYC
 26 collection. Compl. ¶ 57; Ex. 1 at 1. Thus, the nature of Mr. Ripps's performance and
 27 appropriation art project requires use of Yuga's marks in the digital images to which
 28

1 his NFTs point, and in the title of the collection, to accomplish the use of satire to
2 criticize Yuga. *Applied Underwriters*, 913 F.3d at 895 (“The second *New Kids* factor
3 does not implicate the *number* of uses of a mark, but rather the *nature* of the uses.”).
4 Moreover, because the RR/BAYC project depends on using descriptions of Yuga and
5 its BAYC collection, more use of Yuga’s marks is reasonably necessary. *See Cairns*
6 *v. Franklin Mint Co.*, 292 F.3d 1139, 1154 (9th Cir. 2002) (“Where … the description
7 of defendant’s product depends on the description of the plaintiff’s product, more use
8 of the plaintiff’s trademark is ‘reasonably necessary to identify the plaintiff’s product’
9 than in cases where the description of the defendant’s product does not depend on the
10 description of the plaintiff’s product.”).

11 **Third**, Mr. Ripps’s has done nothing to suggest sponsorship or endorsement by
12 Yuga. The goal of a nominative use is typically for the “purposes of comparison,
13 criticism [or] point of reference.” *Mattel Inc.* 353 F.3d at 809. As detailed above, Mr.
14 Ripps has been clear that RR/BAYC serves this goal by using the asserted marks to
15 criticize Yuga’s use of racist and neo-Nazi dog whistles. The Complaint alleges that
16 RR/BAYC NFTs are intended to “show bayc for what it really is” and allow collectors
17 to protest Yuga and “say fuck off to @BoredApeYC!” Compl. ¶¶ 57, 72, 116.
18 Generally, one does not urge its audience to tell a sponsor to “fuck off.” These
19 allegations in the Complaint preclude any suggestion that Yuga sponsors or endorses
20 the RR/BAYC project because they show that the content of RR/BAYC is replete with
21 critical statements about Yuga and the BAYC collection. *See New Kids on the Block*,
22 971 F.2d at 308–09 (“[N]othing in the announcements suggests joint sponsorship or
23 endorsement by the New Kids. The USA Today announcement implies quite the
24 contrary by asking whether the New Kids might be ‘a turn off.’”)

25 Further, although “[t]his element does not require that the defendant make an
26 affirmative statement that their product is not sponsored by the plaintiff” (*Mattel Inc.*
27 353 F.3d at 811), Mr. Ripps has repeatedly done so. As explained above, Yuga has
28

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1 extensively alleged that Mr. Rripps made clear that he created the RR/BAYC NFTs as
2 satirical art directed at criticizing Yuga. Compl. ¶¶ 57, 72, 116. Moreover, the
3 Complaint incorporates by reference the RR/BAYC website in which Mr. Rripps
4 further explains that the RR/BAYC project is satirical and required every purchaser of
5 an RR/BAYC NFT to sign a disclaimer acknowledging that Mr. Rripps was the
6 creator, not Yuga. Compl. ¶¶ 34, 36, 48, 81. Based on these allegations regarding the
7 critical nature of the RR/BAYC, the content on the RR/BAYC website, and Mr.
8 Rripps's repeated criticism of BAYC in RR/BAYC-related communications, Yuga has
9 failed to plausibly alleged that a "reasonably prudent consumer" in the relevant
10 marketplace (*Toyota Motor Sales*, 610 F.3d at 1176) could have interpreted
11 RR/BAYC as being endorsed or sponsored by Yuga.

12 In sum, the Complaint contains only conclusory allegations of consumer
13 confusion that are belied by the critical nature of the RR/BAYC project as described
14 in the Complaint. These allegations of Mr. Ripps's use of the asserted marks, when
15 considered in the light most favorable to Yuga, is protected nominative fair use.
16 Accordingly, Yuga has failed to allege legally sufficient facts for its trademark
17 infringement causes of action.

iii. **Yuga Did Not Allege a Misleading Representation of Fact in Support of Its False Advertising Claims (Claim 7)**

Yuga’s false advertising claims are legally insufficient, in addition to their deficiencies under the *Rogers* test and nominative fair use, for failure to allege advertising that is “misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020); *Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (Under the Lanham Act, false advertising must include a “false or misleading representation of fact.”). The Complaint does not provide a single example of a misleading statement and instead merely concludes that Defendants advertised that “RR/BAYC NFTs are equivalent to authentic Bored Ape NFTs.” Compl. ¶¶ 72, 116.

1 To support this conclusion, the Complaint alleges the statement “To CLARIFY ...
 2 how the website <http://rrbayc.com> works. You reserve an ape which you can choose.
 3 @ryder_ripps will then mint it for you when he is able to. Then it will get transferred
 4 to your wallet Then you can say fuck off to @BoredApeYC!” Compl. ¶¶ 72, 116.
 5 But this statement *distinguishes* RR/BAYC NFTs from Bored Ape NFTs by
 6 clarifying that Mr. Rippss is the creator, not Yuga. The Complaint also alleges that Mr.
 7 Rippss posted, “Looking at @ApeMarketplace and saying fuck you to @BoredApeYC
 8 who’s with me?” Compl. ¶¶ 72, 116. This likewise is not and cannot be alleged to be
 9 misleading: it expresses that the RR/BAYC project is a protest against Yuga.
 10 Moreover, as explained above, Yuga extensively pleaded that Mr. Rippss promoted the
 11 RR/BAYC project as distinct and antithetical to Yuga’s NFTs, including on the
 12 RR/BAYC website and the disclaimer that every purchaser was required to sign.
 13 Compl. ¶¶ 48, 53, 56, 57, 72, 116; Ex. 1 at 1.

14 **iv. Yuga Has Failed To Plausibly Allege Unjust Enrichment
 15 (Claim 8)**

16 Yuga’s unjust enrichment claim is legally insufficient because (1) Yuga has not
 17 plausibly alleged unjust retention of a benefit and (2) the First Amendment precludes
 18 Yuga’s unjust enrichment claim.

19 *First*, unjust enrichment requires the “unjust retention of the benefit at the
 20 expense of another.” *Travelers Cas. Ins. Co. of America v. Hirsh*, 831 F.3d 1179,
 21 1182 (9th Cir. 2016). Yuga’s allegation of “unjust retention” is based on Mr. Rippss’s
 22 use of “BAYC Marks without authorization.” Compl. ¶ 126. However, as explained
 23 in Sections IV.B.i-ii, Yuga has not plausibly alleged trademark infringement and
 24 therefore has also failed to plausibly allege unjust enrichment. *See Mattel, Inc. v.*
 25 *MCA Recs., Inc.*, 28 F. Supp. 2d 1120, 1157 (C.D. Cal. 1998), aff’d, 296 F.3d 894 (9th
 26 Cir. 2002) (holding that defendants’ unjust enrichment claim failed where “defendants
 27 did not infringe or dilute plaintiff’s trademark”).

1 **Second**, under California Law, Yuga cannot claim unjust enrichment based on
 2 Mr. Ripps's exercise of his First Amendment rights. *See McBride v. Boughton, 123*
 3 *Cal. App. 4th 379, 387–88, 20 Cal. Rptr. 3d 115, 122 (2004)* (explaining that unjust
 4 enrichment claims are denied “where application of the doctrine would involve a
 5 violation or frustration of the law or opposition to public policy”). The RR/BAYC
 6 project is a satirical artistic work protected under the First Amendment right of free
 7 speech. *See supra*-Sections IV.A, B.i-ii. Requiring Mr. Ripps to pay restitution under
 8 an unjust enrichment theory for profits received from the RR/BAYC project would
 9 frustrate the strong public policy in favor of First Amendment protections. *See*
 10 *Mattel, Inc. v. MCA Recs., Inc., 28 F. Supp. 2d 1120, 1157 (C.D. Cal. 1998)*, aff'd,
 11 *296 F.3d 894 (9th Cir. 2002)* (denying unjust enrichment claim where “defendants
 12 have a strong... First Amendment interest in parodying a popular brand name”).

13 **v. Yuga Has Failed To Plausibly Allege Conversion (Claim 9)**

14 Yuga's claim for conversion is legally insufficient because (1) Yuga has failed
 15 to allege wrongful disposition of a property and (2) the tort of conversion does not
 16 extend to trademarks in any event.

17 **First**, to state a claim for conversion, Yuga must allege “right to possession of
 18 property” and “wrongful disposition of the property right[.]” *Kremen v. Cohen, 337*
 19 *F.3d 1024, 1029 (9th Cir. 2003)* (internal quotation omitted). Yuga alleges “wrongful
 20 disposition” by stating that Defendants “substantially interfered with Yuga's
 21 ownership and rights in these marks.” Compl. ¶¶ 132-133. However, because Yuga
 22 has not plausibly alleged trademark infringement, Yuga's has also failed to plausibly
 23 allege wrongful disposition of property via any such trademark infringement.

24 **Second**, courts have repeatedly declined to extend conversion to trademarks.
 25 *See Meeker v. Meeker, No. C 02-00741 JSW, 2004 WL 2554452, at *6 (N.D. Cal.*
 26 *Nov. 10, 2004)* (holding that “a claim for conversion should not be extended to reach
 27 the intangible intellectual property rights in a trademark”); *Innospan Corp. v. Intuit,*
 28

1 Inc., No. C 10-04422 WHA, 2010 WL 5017014, at *2 (N.D. Cal. Dec. 3, 2010)
 2 (“Plaintiff’s complaint also alleges a claim for trade infringement under the Lanham
 3 Act. That claim is the appropriate legal avenue for trademark infringement, not
 4 conversion”); Tethys Bioscience, Inc. v. Mintz, et al., No. 09-5115, 2010 WL
 5 2287474, at *7 (N.D. Cal. June 4, 2010) (explaining that “California cases addressing
 6 the application of the conversion tort to intangible property have suggested that this
 7 theory should not be expanded to displace other, more suitable law”). As in those
 8 cases, the appropriate avenue for Yuga to remedy any supposed “conversion” would
 9 be its (baseless) trademark claims.

10 **vi. Yuga Failed to Plausibly Allege Intentional Interference with**
 11 **Prospective Economic Advantage (Claim 10)**

12 Yuga’s intentional interference claim is legally insufficient because Yuga has
 13 not plausibly alleged (1) an independently wrongful act or (2) specific examples of
 14 actual disruption to an economic relationship.

15 **First**, to state a claim for intentional interference with prospective economic
 16 advantage, Yuga must plead that the defendant engaged in an independently
 17 “wrongful” act as defined by some constitutional, statutory, regulatory, or other
 18 determinable legal standard. Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.,
 19 271 F.3d 825, 831 (9th Cir. 2001). Yuga alleges that Defendants engaged in an
 20 independently wrongful act by infringing Yuga’s trademarks. Compl. ¶ 144. Again,
 21 these allegations cannot serve as the independently wrongful act because, for the
 22 reasons stated above, Yuga has not plausibly alleged trademark infringement.

23 **Second**, Yuga has failed to allege a specific economic relationship that
 24 Defendants disrupted. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th
1134, 1153 (2003) (holding that intentional interference requires alleging specific
 25 examples of disruption). Yuga merely alleged that “[a]n economic relationship
 26 existed between Yuga Labs and individuals who have purchased Bored APE NFTs”
 27 and that “prior purchasers of Bored Apes ‘dumped’ Yuga Labs NFTs in favor of ...

1 RR/BAYC NFTs.” Compl. ¶¶ 141, 145. These allegations rely on an impermissible
 2 “market theory” of liability suggesting that Defendants disrupted Yuga relationship
 3 with the entire market of BAYC purchasers. *Sybersound Records, Inc. v. UAV Corp.*,
 4 [517 F.3d 1137, 1151 \(9th Cir. 2008\)](#) (affirming dismissal of intentional interference
 5 claim when plaintiff merely alleged that “ongoing business and economic
 6 relationships with Customers have been disrupted.”).

7 **vii. Yuga Has Not Plausibly Alleged Negligent Interference With
 8 Prospective Economic Advantage (Claim 11)**

9 Yuga’s negligent interference claim is also legally insufficient because Yuga
 10 has failed to allege (1) unreasonable conduct, (2) examples of any prospective or
 11 preexisting business relationships or (3) that Defendants owed a duty of care.

12 *First*, Yuga’s negligent interference claim relies on its trademark infringement
 13 allegations. Compl. ¶ 156; see [Nat'l Med. Transp. Network v. Deloitte & Touche](#), 72
 14 [Cal. Rptr. 2d 720, 736 \(1998\)](#) (negligent interference requires an “independently
 15 wrongful” act). Again, Yuga failed to plausibly allege trademark infringement, which
 16 renders Yuga’s negligent interference claim legally insufficient.

17 *Second*, to state a claim for negligent interference, Yuga must allege “an
 18 economic relationship between the plaintiff and some third party, with the probability
 19 of future economic benefit to the plaintiff.” [Denims v. Ram Imports, Inc](#), No. CV 20-
 20 [0254 DSF \(JCx\)](#), 2021 WL 4814995, at *3 (C.D. Cal. Mar. 5, 2021) (citing
 21 [Sybersound Records, Inc. v. UAV Corp.](#), 517 F.3d 1137, 1151 (9th Cir. 2008)). Here,
 22 Yuga once again states in a general conclusory manner an existing business
 23 relationship with customers that “purchased Bored Ape NFTs.” Compl. ¶¶ 152, 157.
 24 The law is clear that these kinds of conclusory “market theory” allegations cannot
 25 support a negligent interference claim. [Denims](#), 2021 WL 4814995, at *3 (citing
 26 [Westside Ctr. Assocs. v. Safeway Stores 23, Inc.](#), 42 Cal. App. 4th 507, 527 (1996)).

27 *Third*, Yuga failed to plead that Defendants owed a duty of care to Yuga. See
 28 [J'Aire Corp. v. Gregory](#), 24 Cal. 3d 799, 803, 598 P.2d 60 (1979) (negligent

1 interference requires duty of care); *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 621 (N.D.
 2 Cal. 2002) (same). Yuga has alleged that Defendants are Yuga “competitors in the
 3 market for NFTs.” Compl. ¶¶ 66, 150. This allegation precludes Yuga from plausibly
 4 alleging negligent interference because there cannot be a duty of care between
 5 competitors. *See Stoltz v. Wong Comms. LP*, 25 Cal. App. 4th 1811, 1825, 31 Cal.
 6 Rptr. 2d 229 (1994) (“The complaint did not allege such a duty, nor could it, since it
 7 was plain that plaintiff and defendants were competitors.”).

8 **C. Dismissal Under Rule 12(b)(6)**

9 Yuga’s Complaint is subject to dismissal for failure to state a claim based on
 10 the reasons provided above in Section IV.B. The test for legal sufficiency under the
 11 anti-SLAPP statute involves the same analysis as dismissing a cause of action for
 12 failure to state a claim. *Planned Parenthood*, 890 F.3d at 834 (“If a defendant makes
 13 a special motion to strike based on alleged deficiencies in the plaintiff’s complaint, the
 14 motion must be treated in the same manner as a motion under Rule 12(b)(6)[.]”).
 15 Accordingly, Yuga’s federal trademark infringement claims (Claims 1-3) should be
 16 dismissed for the reasons provided Sections IV.B.i-iii because, as explained above, the
 17 arguments provided in those sections apply equally to Yuga’s federal law claims.
 18 Yuga has also failed to plausibly plead its state law claims (Claims 4-11) for the
 19 reasons provided in Sections IV.B.i-vii.

20 **V. CONCLUSION**

21 For the reasons set forth above, Mr. Ripps and Mr. Cahen respectfully request
 22 that the Court strike Claims 4-11 in Yuga’s Complaint and award Mr. Ripps and Mr.
 23 Cahen their fees and costs pursuant to Cal. Civ. Proc. Code. § 425.16(c) and dismiss
 24 Claims 1-3 pursuant to Rule 12(b)(6), or in the alternative, dismiss Yuga’s Complaint
 25 pursuant to Rule 12(b)(6) in its entirety.

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1 Dated: October 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all attorneys of record via the Court's ECF system on October 3, 2022.

By: /s/ Louis W. Tompros

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